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2725

No. 13246

United States
Court of Appeals
For the Ninth Circuit.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13246

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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J. H. CUMMINS, ESQ.,
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Los Angeles 14, California.

PEART, BARATY & HASSARD,
111 Sutter Street,
San Francisco, Calif.,
Attorneys for Appellant.

JOSEPH D. MICHAEL, ESQ.,
CHRIS PAPAS, ESQ.,
MICHAEL AND PAPAS,
515 Bank of America Building,
Stockton, California,
Attorneys for Appellee.

In the District Court of the United States, Northern District of California, Southern Division

No. 30360

JOSEPH J. SEAMAS,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant.

COMPLAINT FOR PERSONAL INJURIES

Plaintiff complains of defendant and for cause of action alleges:

I.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of California, and other states, and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in said State of California and other states.

II.

That at all times herein mentioned, defendant was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by defendant in such interstate commerce, and the injuries to plaintiff, hereinafter complained of, arose in the course of and while plaintiff and de-

fendant were engaged in the conduct of such interstate commerce.

III.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

IV.

That on or about the 9th day of December, 1950, at or about the hour of 10:00 o'clock p.m. of said day, plaintiff was regularly employed by defendant as a "field man," working on and about defendants' Mormon Yard in the City of Stockton, County of San Joaquin, State of California.

V.

That at said time and place and while acting in the regular course and scope of his duties as such employee, plaintiff was required to and he was engaged in operating the hand brake on a railroad box car on and about the aforesaid Mormon Yard of defendant; that at said time and place defendant owed plaintiff the duty of exercising ordinary care in providing him with a safe place for the performance of the duties of his said employment; that at said time and place defendant, its servants, agents and employees, carelessly and negligently gave certain signals in connection with the movement of defendants' railroad cars; that at said time and place defendant, its servants, agents and employees, carelessly and negligently moved a certain locomotive and railroad box cars; that as a direct

and proximate result of said carelessness and negligence of defendant, its servants, agents and employees as aforesaid, and while plaintiff was attempting to operate said hand brake, he was thrown from said railroad box car with great force and violence and sustained the injuries to his person hereinafter set forth.

VI.

That by reason of the carelessness and negligence of or defendant, its servants, agents and employees and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries: Injury to his spine, injury to his back, injury to both legs and other parts of his body and suffered extreme and intense plain and severe shock to his nervous system.

VII.

That at the time of the happening of the accident, plaintiff was a strong and able-bodied man capable of earning, and he was earning, the sum of approximately $400.00 per month; that by reason of the facts herein alleged plaintiff is and he will be for an indefinite period of time in the future, rendered incapable of performing his usual work or services, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained plaintiff will pray leave of Court to insert said sum as the reasonable value of said loss of services.

VIII.

That by reason of the carelessness and negligence of the defendant, its servants, agents and employees, and as a result thereof, the plaintiff was hospitalized and did secure the services of nurses, physicians and surgeons, and said plaintiff has had medicines, medical bandages and appliances, for which plaintiff will be compelled to incur an indebtedness, the amount of which is not now known and plaintiff prays leave of this Court to insert herein the amount of such indebtedness when it is ascertained.

IX.

That as a direct and proximate result of the carelessness and negligence of defendant, its servants, agents and employees, as aforesaid, plaintiff has been generally damaged in the sum of Seventy-five Thousand ($75,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of Seventy-five Thousand ($75,000.00) Dollars, together with the special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

MICHAEL AND PAPAS,

By /s/ JOSEPH MICHAEL,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now defendant and for its answer to the Complaint on file herein Admits, Denies and Alleges as follows:

I.

Answering Paragraphs V, VI, VII, VIII and IX, Denies each and every allegation contained in said paragraphs. Further answering Paragraph VII, Alleges that upon any trial hereof it will produce its records which will accurately reflect the amount plaintiff was earning and the amount he was capable of earning for the period preceding his injury; and Denies that plaintiff has been injured or damaged in any sum or at all by reason of any negligence of defendant.

Wherefore, etc.

First Affirmative Defense

I.

Defendant Alleges that if plaintiff suffered any injuries or damages at the time and place referred to in the Complaint plaintiff's own negligence caused and contributed to said injuries or damages.

Wherefore, etc.

Second Affirmative Defense

I.

Defendant Alleges that at the time and place referred to in the Complaint if plaintiff suffered any

injuries or damages they were solely caused by plaintiff's own negligence.

Wherefore, etc.

Third Affirmative Defense

I.

Defendant Alleges that at the time and place set forth in the Complaint any injuries or damages suffered by plaintiff were proximately caused by and were the result of an unavoidable accident and not proximately caused or contributed to by any negligence of the defendant.

Wherefore, defendant prays judgment that plaintiff take nothing by reason of his Complaint on file herein; that defendant be awarded its costs and disbursements herein incurred and expended, and for such other and further relief as to the Court may seem just and proper in the premises.

ROBERT W. WALKER,

J. H. CUMMINS,

By /s/ J. H. CUMMINS,
Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1951.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Plaintiff above named hereby demands a trial by jury of the above-entitled action.

Dated May 10, 1951.

MICHAEL AND PAPAS,

By /s/ CHRIS PAPAS,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 11, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION AND
MOTION TO AMEND

To Defendant Above Named and to Messrs. Robert W. Walker and J. H. Cummins, Its Attorneys:

You Are Hereby Notified that on the 9th day of July, 1951, at the hour of ten o'clock a.m., in the courtroom of the Honorable Edward P. Murphy, Judge of the United States District Court, Room 307, located in the United States Post Office and Courthouse Building, 7th and Mission Streets, in the City and County of San Francisco, State of California, plaintiff will move the Court to amend his complaint in the manner so that paragraph IX of said Complaint and the prayer thereof will be

amended to ask for $150,000.00 general damages instead of the present $75,000.00 general damages alleged in said paragraph IX and asked in the prayer of said complaint.

Said motion will be made upon all the papers and files herein and the affidavit filed herewith.

Dated this 30th day of June, 1951.

MICHAEL AND PAPAS,

By /s/ CHRIS PAPAS,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF CHRIS PAPAS

State of California,
County of San Joaquin—ss.

Chris Papas, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff herein; that since the original complaint was filed herein it has been determined that the injuries to plaintiff, Joseph J. Seamas, are much more serious than first indicated; that Joseph J. Seamas had definite nerve findings; that he has marked hypertrophic changes appearing at his lumbosacral spine, which has driven the spinous process of sacrum one against the first sacral root; that he has marked pain on extension and does not have the normal reflexes; that plaintiff will be handicapped in indus-

try for the rest of his life; that plaintiff may require further medical care and hospitalization.

Deponent further sayeth that upon the medical reports and advice of doctors who examined plaintiff in the month of March, 1951, plaintiff was much more seriously injured than was originally anticipated and the prognosis is that plaintiff will suffer pain for an indefinite length of time;

That a man disabled as severely as plaintiff now appears to be disabled should have an evaluation of his injuries much in excess of $75,000.00, the original evaluation;

Wherefore, your deponent, in behalf of and for plaintiff, prays that the complaint heretofore filed and served be amended in the regard that general damages be assessed at $150,000.00, and the prayer accordingly.

/s/ CHRIS PAPAS.

Subscribed and sworn to before me this 28th day of June, 1951.

[Seal] /s/ JEANNINE CATTRONE,
Notary Public in and for the County of San Joaquin, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1951.

[Title of District Court and Cause.]

ORDER GRANTING PLAINTIFF LEAVE TO AMEND HIS COMPLAINT

The motion of plaintiff for an order requesting leave of Court to allow amendment to his Complaint, having come on regularly for hearing and having been submitted for decision;

It Is Hereby Ordered that said motion be and the same is hereby granted as follows:

It is ordered that plaintiff be granted leave to amend his Complaint in the following manner:

"Comes now plaintiff above named, and as and for his amended complaint, incorporates, each and every, all and singular, generally and specifically, the allegations in plaintiff's first complaint served and filed herein, excepting that he amends the allegation of general damages contained in Paragraph IX and prayer of said complaint to the sum of One Hundred Fifty Thousand Dollars ($150,000.00)."

Done in open Court this 9th day of July, 1951.

/s/ EDWARD P. MURPHY,
Judge of the U. S. District Court.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now plaintiff above named, and as and for his amended complaint, incorporates each and every, all and singular, generally and specifically, the allegations in plaintiff's first complaint served and filed herein, excepting that he amends the allegation of general damages contained in Paragraph IX and the prayer of said complaint to the sum of One Hundred Fifty Thousand Dollars ($150,000.00).

Wherefore, plaintiff prays accordingly.

MICHAEL AND PAPAS,

By /s/ CHRIS PAPAS,
Attorneys for Plaintiff.

[Endorsed]: Filed July 24, 1951.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now defendant and for its answer to the Amended Complaint on file herein states as follows:

I.

Defendant incorporates its answer to the original Complaint by this reference.

II.

Defendant denies that plaintiff was damaged in the sum of $150,000.00 or in any sum or at all by

reason of any negligence on the part of this defendant.

Wherefore, defendant prays judgment that plaintiff take nothing by reason of his Amended Complaint on file herein; that defendant be awarded its costs and disbursements herein incurred and expended, and for such other and further relief as to the Court may seem just and proper in the premises.

ROBERT W. WALKER,

J. H. CUMMINS,

By /s/ J. H. CUMMINS,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 4, 1951.

RULE 820

In switching cars the following must be observed:

(a) Warn persons in, on, or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading.

(b) Cars must not be shoved without taking proper safeguards to avoid accidents. Slack must be stretched to test couplings.

[Endorsed]: Filed Oct. 9, 1951.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00).

/s/ JEROME A. STARR,
Foreman.

Filed at 6 o'clock and 45 minutes p.m.

C. W. CALBREATH,
Clerk.

By /s/ HOWARD F. MAGEE,
Deputy Clerk.

[Endorsed]: Filed Oct. 8, 1951.

In the United States District Court for the Northern District of California, Southern Division

No. 30360-Civil

JOSEPH J. SEAMAS,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on October 1, 1951, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Chris Papas, Esq., and Joseph D. Michael, Esq., appearing as attorneys for the plaintiff and Joseph Cummins, Esq., and G. L. Baraty, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on the 1st, 2nd, 3rd, 4th, 5th, and 8th days of October, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz.: "We, the Jury, find in favor of the Plaintiff and assess the damages against the defendant in the sum of Twenty-two Thousand Five Hundred Dollars ($22,-

500.00), Jerome A. Starr, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00) together with his costs herein expended taxed at $.....

Dated October 9, 1951.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket Oct. 9, 1951.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant hereby moves the court to vacate and set aside the Judgment heretofore entered on October 9, 1951, in the above-entitled case and to grant the defendant a new trial upon the following grounds materially affecting the substantial rights of the defendant in said action:

(1) Irregularity in the proceedings of the court and abuse of discretion by which defendant was prevented from having a fair trial;

(2) Excessive damages appearing to have been given under the influence of passion and prejudice;

(3) Insufficiency of the evidence to justify the verdict.

(4) Error in law occurring at the trial.

Said motion is made and based upon the minutes and records of the court, the pleadings and papers on file herein and the reporter's transcript.

Dated October 18, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

GUS L. BARATY,

By /s/ J. H. CUMMINS,

Attorneys for Defendant.

Written Statement of Reasons in Support of Motion

1. Defendant urges that the Court's examination of the defendant's witness, Mahan, constituting an irregularity by which defendant was prevented from having a fair trial. The Court's manner of questioning this witness, the Court's comments and questions asked, defendant regards as prejudicial.

2. Excessive damages were granted plaintiff, $22,500 for a soft tissue injury and under all circumstances the damages were so great that the judgment should shock the conscience of the court.

3. There is insufficient evidence of injury and damages to justify the verdict and there is insufficient evidence of negligence to justify the verdict.

4. The instructions offered by plaintiff and given by the Court numbered 23 is erroneous in that it excuses any possible negligence on the part of the plaintiff and places an absolute liability on defendant. It reads as follows:

> "When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury."

Republic Iron and Steel vs. Berkes,
70 N.E. 815.

Points and Authorities

Rule 59, Federal Code of Civil Procedure.
45 U.S.C.A. Sec. 51, et seq.

Supplemental case authorities will be forwarded as quickly as possible.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 19, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that defendant's motion for new trial be, and the same hereby is, Denied.

Dated November 28th, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Republic Iron and Steel Co. vs. Berkes,
70 N.E. 815.

[Endorsed]: Filed Nov. 28, 1951.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF EXECUTION

Good cause appearing therefor, it is hereby ordered that a stay of execution be granted on the judgment heretofore rendered herein, for a period up to and including the 31st day of December, 1951.

Done in open court this 21st day of December, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Dec. 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Clerk of the Above-Entitled Court:

Notice is hereby given that the defendant, The Atchison, Topeka and Santa Fe Railway Company, hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action of the 9th day of October, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY & HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, on the 9th day of October, 1951, a judgment was entered in the District Court of the United States, for the Northern District of California, Southern Division, in favor of the Plaintiff in the above-entitled action and against The Atchi-

son, Topeka and Santa Fe Railway Company, the defendant herein, and

Whereas, The Atchison, Topeka and Santa Fe Railway Company, defendant herein, desires to give an undertaking for stay on appeal as provided to be given under Rule 73(d) Federal Rules of Civil Procedure,

Now Therefore, in consideration of the premises and of such appeal, the undersigned, Indemnity Insurance Company of North America, a corporation, organized and existing under the laws of the State of Pennsylvania, and duly authorized to transact a general surety business in the State of California, does acknowledge itself bound as surety to said Joseph J. Seamas, and as surety for The Atchison, Topeka and Santa Fe Railway Company, defendant and appellant herein, in the sum of Two Hundred Fifty Dollars and no/100 ($250.00), conditioned as provided in Rule 73(c) of the Federal Rules of Civil Procedure, to secure the payment of costs if the appeal is dismissed or the judgment affirmed or such costs as the Court of Appeals may award if the judgment is modified, and further the Indemnity Insurance Company of North America, does acknowledge itself bound as surety to said Joseph J. Seamas and as surety for The Atchison, Topeka and Santa Fe Railway Company, defendant and appellant herein, in the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00) conditioned, as provided in Rule 73(d) of the Federal Rules of Civil Procedure, for the satisfaction of the judgment in full, together with interest at the

rate of 7% per annum for one year from the date of entry of the aforesaid judgment, October 9, 1951, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and to satisfy in full such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact, at Los Angeles, California, the 24th day of December, 1951.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

By /s/ C. F. BATCHELDER,
Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ ROBERT W. WALKER,
Attorney for Defendant and Appellant.

I hereby approve the foregoing bond this 26th day of December, 1951.

/s/ GEORGE B. HARRIS,
Judge of the United States District Court.

State of California,
County of Los Angeles—ss.

On this 24th day of December in the year one thousand nine hundred and Fifty-one, before me, Blanche T. Moore, a Notary Public in and for the County of Los Angeles, personally appeared C. F. Batchelder, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ BLANCHE T. MOORE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 1, 1953.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

NOTICE OF BOND HAVING BEEN FILED ON APPEAL

To: The Plaintiff, Joseph J. Seamas, and to his Attorneys, Michael and Papas:

You and each of you will please take notice that a supersedeas bond was filed concurrently with the

filing of the Notice of Appeal and that said bond was filed by corporate surety.

Dated this 26th day of December, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY & HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal hereby taken. You will include in said transcript:

1. All of the evidence introduced at the time of trial and transcribed by the court reporter.

2. All exhibits admitted into evidence.

3. All stipulations of the parties admitted into evidence.

4. All orders, rulings and judgments of the court.

5. All pleadings presented to the court.

6. This Praecipe and service thereon.

Said transcript is to be prepared as required by law and the rules of the court and the Federal Rules of Civil Procedure, and especially Rules 73 (g) and 75 (k) of the Rules of Civil Procedure for the District Courts of the United States.

Dated December 26, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY & HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 26, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD TO BE CERTIFIED TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Clerk of the United States District Court for the Northern District of California, Southern Division:

You are hereby requested to prepare the record for the United States Court of Appeals for the Ninth Circuit in connection with the appeal taken herein, to consist of the following: The complete record and all the proceedings and evidence in the action, including all pleadings, testimony, exhibits, depositions, verdicts, judgment and Notice of Appeal.

You are requested to certify the foregoing to the Court of Appeals for the Ninth Circuit within forty (40) days from the date of the filing of the Notice of Appeal.

Dated December 26, 1951.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY & HASSARD,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 26, 1951.

In the Southern Division of the United States District Court for the Northern District of California

No. 30360

JOSEPH J. SEAMAS,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Defendants.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

CHRIS PAPAS, ESQ., and
JOSEPH D. MICHAEL, ESQ.

For the Defendant:

ROBERT W. WALKER, ESQ.,
MESSRS. PEART, BARATY & HAZARD, by
JOSEPH L. CUMMINS, ESQ., and
GUS L. BARATY, ESQ.

October 1, 1951, 10 A.M.

(A jury was duly impaneled and sworn.)

(Opening statement was made by counsel for the plaintiff.)

JOSEPH JOHN SEAMAS

the plaintiff, called as a witness in his own behalf, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Joseph John Seamas, 2002 West Alpine.

The Clerk: And your operation?

A. Switchman.

Direct Examination

By Mr. Michael:

Q. Mr. Seamas, you said you live on Alpine Street? A. West Alpine.

Q. Is that in Stockton, California?

A. Yes, sir.

Q. How long have you lived in Stockton, Mr. Seamas? A. Since 1947, August 19th.

Q. I see. And what is your age, Mr. Seamas?

A. 37.

Q. And what does your family consist of?

A. A wife and one child.

Q. Mr. Seamas, who do you work for?

A. For the Santa Fe Railroad Company. [2*]

Q. And when did you first go to work for the Santa Fe Railroad? A. On May 1, 1937.

Q. May 1, 1937? A. Yes, sir.

Q. Prior to that time who did you work for?

A. For the Northwestern Pacific Railroad Company.

Q. What years did you work for the Northwestern Pacific Railroad Company?

* Page numbering appearing at top of page of original certified Reporter's Transcript.

(Testimony of Joseph John Seamas.)

A. In the years of 1930 into 1934.

Q. What type of work did you do with them?

A. As a blacksmith apprentice boy.

Q. Who else have you worked for?

A. For the Southern Pacific Railroad Company.

Q. And what years did you work for the Southern Pacific Railroad, do you recall?

A. The latter part of 1936 into 1937.

Q. What type of work did you do with the Southern Pacific Railroad Company?

A. Boilermaker helper.

Q. Mr. Seamas, have you been working for the Santa Fe Railroad steadily since 1937?

A. Pardon me, would you repeat?

Q. I say, have you been working for the Santa Fe Railroad steadily since 1937? [3]

A. Up to 1947.

Q. Up to 1947? A. Yes, sir.

Q. And what happened then?

Mr. Cummins: Just a moment. Object to what happened then. It is immaterial and irrelevant, if the Court please.

Mr. Michael: I will withdraw the question, your Honor.

The Court: The objection will be overruled.

Mr. Michael: Would you read the question, please?

(Question read by the reporter.)

Mr. Cummins: I am going to add to my objection, if the Court please, indefiniteness.

The Court: Overruled.

(Testimony of Joseph John Seamas.)

A. I don't know. So I was removed from service——

Mr. Cummins: Object, if the Court please. This is the purpose of my original objection. It is immaterial and irrelevant, bringing in outside issues.

The Court: I can't see the relevancy of any circumstances that borders on a period of time three or four years anterior to the accident unless you can demonstrate there be some casual relationship, or some logical relationship.

Mr. Michael: Your Honor, the only thing I was attempting to do was bring out the history of his working for the railroad, the times.

The Court: For that limited purpose, then it may be [4] received, but whatever reasons may have been underlying any prior termination of employment is not relevant to any controversy and I so charge the jury. Merely to show the continuity of relationship, that is all.

Mr. Michael: Yes, your Honor. Perhaps I may do it this way.

Q. Did you return to work for the Santa Fe Railroad, Mr. Seamas?

A. In 1949 on reinstatement.

Q. And about what date did you return to work for the Santa Fe Railroad in 1949, approximately?

A. That is uncertain. I don't know.

Q. Just approximately, do you remember the month? A. The month of June.

Q. June, 1949, you returned to service of the Santa Fe Railroad? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Now, in what capacities were you employed by the Santa Fe Railroad, Mr. Seamas? What was your job? A. Switchman.

Q. In what yards were you employed by the Santa Fe Railroad?

A. I was employed in the so-called San Francisco Terminal Division, in China Basin, San Francisco, in Richmond. That was from 1937 until 1941.

Q. Where else were you employed by the Santa Fe Railway?

A. Bakersfield, California, from 1941 until I was removed from [5] service.

Q. Where else were you employed? What other yards?

A. And Stockton, California, after reinstatement.

Q. When did you start working at the Mormon yard in Stockton? A. In July, I think.

Q. Of what year? A. In 1949.

Q. Had you started working as a switchman in the Mormon yard in July, 1949? A. Yes, sir.

Q. Were you employed by the Santa Fe Railroad on December 19—on December 9, 1950?

A. Yes, sir.

Q. And at that time were you injured while working for the Santa Fe Railroad?

A. Yes, sir.

Q. And do you recall what day of the week that was, Mr. Seamas? A. Saturday night.

Q. And that yard is located in Stockton, is that correct, the Mormon yard? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. At what time, Mr. Seamas, did you report to work on the day that you were injured?

A. About three or four o'clock. It has been so long I—— [6]

Q. What was that, in the afternoon?

A. Saturday afternoon.

Q. Until what time were you to work that day? How late was your shift?

A. Eleven o'clock or twelve.

Q. Will you explain to the ladies and gentlemen of the jury what type of clothing you were wearing when you reported to work?

A. A pair of bib overalls that the bib comes up to your chest and has suspenders that hook on, and a jacket, and catpaws shoes that laced above the ankles about eight inches and a half.

Q. Did you wear any gloves? A. Yes, sir.

Q. What type of gloves were they?

A. Leather.

Q. Leather gloves? A. Yes, sir.

Q. Were they new or old gloves?

A. Oh, about three to four days old.

Q. And you say you had shoes on which came up over your ankles?

A. Just a little above the ankles, yes, sir.

Q. And what type of soles did you have on those shoes?

A. I think it was catpaw soles, those crepe——

Q. A rubber type of sole? [7]

A. It is a combination.

Q. Combination sole? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Did you report to work with any equipment that day? A. With my lantern.

Q. Your lantern? A. Yes, sir.

Q. Now, the clothes that you have described and the lantern, is that more or less the type of clothing that the railroad men wear when they are working?

A. Yes, sir.

Q. Now, with whom were you working on the day that you were injured, Mr. Seamas?

A. The foreman was Mr. L. A. Mahan, he is our foreman. My partner, the pinpuller, the other switchman, was Mr. Weith, and also Mr. Marrs and Mr. Strain, the fireman.

Q. And what was Mr. Marrs' job?

A. Engineer.

Q. Mr. Strain was the fireman?

A. Yes, sir.

Q. And Mr. Mahan was the foreman?

A. Yes, sir.

Q. And Mr. Weith was the pinpuller or switchman? A. Yes, sir.

Q. What was your job? [8] A. Field man.

Q. A field man. Now, Mr. Seamas, do these people compose what is called the crew, these five people? A. Yes, sir.

Q. And do they work together as a unit?

A. Yes, sir.

Q. And what is the job of a crew? What do they do, just generally?

A. Well, just generally when we report to work—like we go in, we find what they call a

(Testimony of Joseph John Seamas.)

register. It is a long sheet in our words, and after we find the register sheet the yardmaster issues the foreman switch lists which are in paper form and from then we go out and switch cars from one track to another in making up trains and breaking of trains. It is a regular routine. He gives us a copy of that switch list or either he makes one and that is how we all work together. It is no verbal when we are working. It is all with signals, hand signals and——

Q. Mr. Seamas, who directs the crew as to what switching to make?

A. The foreman of the crew.

Q. Is he more or less the boss of the crew?

A. He is the boss.

Q. And you say he is given this set of instructions by the company, this switch list? [9]

A. Yes, sir.

Q. Now, who runs the engineer.

A. The engineer.

Q. And is he the only person that runs the engine?

A. Well, that is out of my jurisdiction, but I believe he is. Sometimes the fireman runs it.

Q. Sometimes the fireman runs the engine, but the engineer and the fireman are both in the engine?

A. Yes, sir.

Q. Who instructs the engineer or the fireman if he happens to be taking the place of the engineer? Who instructs them when to move the engine and when not to move the engine?

(Testimony of Joseph John Seamas.)

A. The fireman.

Q. How does he instruct them? How does he advise them when to move and when not to move?

A. By signal.

Q. By signals, and for example, do they have a specific signal for going forward?

A. Yes, sir.

Q. And they have a specific signal for going backwards? A. Yes, sir.

Q. And a signal to stop? A. Yes, sir.

Q. And how are these signals given during the day, for example?

A. By daytime, between sunrise and sunset, by hand signals. [10]

Q. And how about during the evening?

A. And by night, night signals are required with a lantern.

Q. Now, during the switching operations you stated the engineer and fireman are on the engine. Now, where is the foreman and the pinpuller and the fieldman? Where are they?

A. Well, we are out on the ground on the area. The pinpuller is usually between the engineer and the foreman on the ground, and I am out doing the field work—throwing switches like I was told to.

Q. Now, you spoke of the pinpuller and his position. What does the pinpuller do? What is his job, Mr. Seamas?

A. Well, he cuts the cars off as the foreman gives the kick sign to kick the cars, or if he is to go into another track he is to ride on the end of a

(Testimony of Joseph John Seamas.)

cut of cars that the engines got hold of and take the cars and the engine or engines to where the location that the foreman has told him to, or cars.

Q. Now, you stated that you were a switchman, is that correct? A. Yes, sir.

Q. And you spoke briefly of your duties as a switchman. Now, on December 9, 1950, when you were injured, were you performing the duties of a switchman? A. Yes, sir.

Q. And do you recall, Mr. Seamas, approximately what time you were injured?

A. Around ten o'clock at night. [11]

Q. Do you recall the nature of the weather that night? A. Foggy.

Q. Foggy? A. Yes, sir.

Q. Was it dark also? A. Very dark.

Q. Mr. Seamas, I am going to call your attention to this diagram which I have placed on the blackboard. That purports to be a representation of the track layout in the Mormon yard in Stockton. Will you glance at that and tell me if that is more or less a substantial representation of the yard in Stockton? A. Yes, sir.

Q. Now, merely for the purpose of identification, Mr. Seamas, what is this track called?

A. The No. 1 lead track.

Q. The No. 1 lead track? A. Yes, sir.

Q. And what is this track here called? (Indicating.)

A. That is called No. 10 track, also the back lead track.

(Testimony of Joseph John Seamas.)

Q. The back lead track? A. Yes, sir.

Q. And what are these tracks called?

A. The rip tracks.

Q. Rip tracks? [12] A. Yes, sir.

Q. And what is this track here called, (indicating), Mr. Seamas?

A. That is called the tail track leading into the main line.

Q. Now, what instrument or gadget is used to join or separate these tracks?

A. A switch stand connected onto a bar at the end of each switch point to line the tracks in the direction that you want it to go.

Q. A switch then, and that is the method used for a—for manipulating these tracks?

A. Yes, sir.

Q. Is there a switch at this point (indicating)?

A. Yes, sir.

Q. What is that switch called?

A. That is called the bull switch.

Q. I will indicate that by a circled X. And are there switching stands at all these points where the various tracks join this lead track?

A. Yes, sir, with numbers.

Q. And what are they called?

A. No. 6 switch stand.

Q. I will just put a circled X with a number 6 around it for the purposes of identification. Likewise, is this the No. 5 switch stand right on down the line? [13] A. Yes, sir.

Q. Now, there are tracks joining the back lead

(Testimony of Joseph John Seamas.)

track. Are there also switch stands at those points?

A. Yes, sir.

Q. And are there switch stands at this area where the rip tracks come into this back lead track?

A. Yes, sir.

Q. And what direction is the top of the map here, the diagram? A. North.

Q. And the bottom is south? A. South.

Q. And east to the right and west to the left, is that correct? A. Yes, sir.

Q. Now, these tracks are called what, these various tracks here (indicating)?

A. Those are the regular numbered tracks from 1 over to 10, trainyard tracks.

Q. And they are as they are numbered at the present time, is that correct? A. Yes, sir.

Q. No. 1 being the lead track also?

A. Yes, sir.

Q. And No. 10 also being the back lead track, is that correct? [14] A. Yes, sir.

Q. And are these tracks numbered here (indicating)? A. Yes, sir.

Q. What are they numbered as?

A. They are numbered as 1 to 3, west to east.

Q. Now, Mr. Seamas, what type of work was the crew doing when they first reported for work that day? A. We had done——

Q. Just generally.

A. We had worked to pick up cars from—like we got there track No. 2, or track No. 5, it is hard to say now because it has been so long. They have

(Testimony of Joseph John Seamas.)

got the switch lists that we copy and had picked up some cars, and were making up trains preparing them for the different locations where they were going to go.

Q. And did they continue that type of work throughout your shift?

A. We did up until about 9:00, 9:30, somewheres around that neighborhood. Then we went to supper.

Q. You went to supper? A. Yes, sir.

Q. I see. And then you returned to work?

A. Yes, sir.

Q. How long did you take for supper?

A. Twenty minutes; sometimes it takes longer. But around [15] twenty to twenty-five minutes on supper.

Q. When you report back to work after supper do you work with the same crew? A. Yes, sir.

Q. And do you work with the same crew every day?

A. Yes, sir, seven days a week, every day.

Mr. Michael: Your Honor, I can go into the facts at this time, or if you would rather wait until after lunch——

The Court: All right, we will take the noon adjournment, ladies and gentlemen, and resume at two o'clock this afternoon. The same admonition to you. You may now retire.

(Thereupon an adjournment was taken until 2:00 p.m. this date.) [16]

October 1, 1951, 2 P.M.

JOSEPH J. SEAMAS

called as a witness in his own behalf, resumed the witness stand.

Direct Examination
(Continued)

By Mr. Michael:

Q. Mr. Seamas, this morning you testified that on December 9, 1950, you were employed by the Santa Fe Railroad Company and you were employed at the Mormon Yard in Stockton, California, is that correct? A. Yes, sir.

Q. And you further testified that at that time you were employed as a switchman and you had reported to work at the Mormon Yard at approximately three or four o'clock in the afternoon.

A. Yes, sir.

Q. This morning I also called your attention, Mr. Seamas, to this diagram on the board which more or less purports to be a representation of the track layout of the Mormon Yard in Stockton, and at that time you had an opportunity to observe it and you stated it more or less was a true representation; is that correct? A. Yes, sir, it was.

Q. Now, Mr. Seamas, would you be kind enough to step down to the blackboard and in your own words explain to the ladies [17] and gentlemen of the jury and the Court just what took place prior to the accident on December 9th?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Just take your time; don't be in a hurry, Mr. Seamas.

A. At about 9:45 or 10:00 o'clock, or around that time, we had gotten our instructions from the yardmaster and came over to this area, this rip track area and in which these tracks 1, 2, and 3. Mr. Mahan and I walked over, and the engine came on around, Mr. Mahan following it, the pinpuller, and then we got some cars out of the rip tracks 1, 2, and 3.

Mr. Cummins: Excuse me, sir. I am having difficulty understanding, Judge; I'm sure maybe some of the jurors are having difficulty.

The Court: Has any of the jurors been unable to hear what has been said? Do you hear him? Are you able to hear him?

The Jurors: Yes.

The Court: All right. Counsel, you can move your chair over if you don't hear.

Mr. Cummins: Well, all right; I will move it over here.

The Witness: I'm sorry. We then gathered those five cars, put them on this track No. 10, the balance back into the rip tracks. We came against the five cars with the engine and coupled onto it. We proceeded up along the back lead track, the crew and I, the engine was slowed up. I got off at No. 9 switch stand, which is this cross here. They continued on up to [18] the tail track with the five cars, the engine and the crew. I then lined the switch which controls the switch points of No. 9

(Testimony of Joseph John Seamas.)
track, walked over to track No. 3 right across over into track No. 3 switch stand.

Mr. Michael: Mr. Seamas, just for the purpose of clarification, would you indicate with the colored chalk there the position where you stepped off the train and indicate that as S-1, please?

(Witness indicates on blackboard.)

Q. Now, will you indicate with this chalk the path that you followed to this other switch stand, please?

(Witness indicates on blackboard.)

Q. Just a dotted line will be fine.

(Witness indicates.)

Q. And will you label that as S-2 please? Now the point where you had gone to this switch stand.

(Witness indicates on blackboard.)

Q. Go ahead, Mr. Seamas. What happened next?

A. I lined this track 11 which was lined to go to track No. 3, so I threw the switch so it would be lined for track No. 2, which one of them five cars we had a hold of were to go. Then after lining my No. 3 track switch at the switch stand, I walked up to track No. 5 (indicating).

Q. Will you label that as S-3, please?

(Witness indicates.) [19]

A. ——to line track No. 5. In the meantime Mr. Mahan had kicked the car going to No. 9 down, and he kicked—he kicked it, the pinpuller cut it off and

(Testimony of Joseph John Seamas.)

it was rolling down from up here down to go into No. 9 track.

Q. Would you indicate the position of the car when it came to rest on the No. 9 track, please? Just draw it in.

(Witness indicates on blackboard.)

Q. And then what took place after this car had been kicked down and come to rest on track 9 which you speak of?

A. After lining No. 5 switch stand for No. 5 switch, I proceeded—started to go toward No. 6, and I was half way between No. 6 and No. 5 track right here when this Mahan starts kicking another car. I knew this car right here, that had stopped to foul the other car that was coming to go into No. 6 track or No. 1 track lead and wouldn't clear. Mr. Mahan started to throw that switch and I hollered at him not to. That car then came down and tied onto this one—coupled onto this one. Shall I draw it?

Q. Yes, please.

A. I went ahead, continued on up and noticed that the coupling had made on the second car that he had kicked. I went up to the—on the opposite side of the car that coupled onto the first car. Mr. Mahan was on this side and I was about here. I told Mr. Mahan, I says, "I am going to go up and check that brake or see whether the brake was set." And he [20] says, "O.K., kid go ahead." On the northwest end of the car I went up to check that

(Testimony of Joseph John Seamas.)

brake. As I get up to the brake platform with my right foot I was knocked off.

Q. That is fine. Would you sit down, please, Mr. Seamas? Now, Mr. Seamas, just for the purposes of reiteration and clarification now, you stated that you pulled these five cars out of this area known as the rip track area, is that correct?

A. Yes, sir.

Q. And the train pulled these five cars out and proceeded along this area here called the back lead track, is that correct? A. Yes, sir.

Q. And you stepped off at this point which is marked S-1, is that right? A. Yes, sir.

Q. And what was the purpose of stepping off at this point S-1? A. To line that switch.

Q. By lining the switch what do you mean, Mr. Seamas?

A. Well, the last car of the five cars we had a hold of going out with, was to go into No. 9 track first. [21]

Q. I see. And you had maneuvered the switch there so that as the car came down this area it would go into this track is that right? A. Yes, sir.

Q. At that point you started to walk over to the switch which connects track 3 to this lead track; is that correct? A. Yes, sir.

Q. And in the meantime where had the train gone? A. Right east onto the tail track.

Q. And approximately where in the tail track had it come to a stop, do you recall?

(Testimony of Joseph John Seamas.)

A. I would say right underneath that "T" of "Track."

Q. Would that be the last or the rear, the most westerly car? A. Yes, sir.

Q. About this position here?

A. Somewhere in that neighborhood; it was foggy and I couldn't very well see.

Q. But it was in this general area?

A. Yes, sir.

Q. And then you proceeded to cross and to walk over to this switch stand on track 3?

A. Yes, sir.

Q. Did you line this switch?

A. Yes, sir. [22]

Q. Why did you line that switch, Mr. Seamas?

A. One of the cars—of the five cars had to go to track No. 2.

Q. In other words, you opened this switch so that a car proceeding along here would continue past the track 3 and go into 2; is that correct?

A. Yes, sir.

Q. And then you walked down to switch No. 4, is that right—switch stand No. 4?

A. No. 5, sir.

Q. Switch stand No. 5; excuse me; switch stand No. 5 right here. At that point had any of the cars been kicked from the train at that time when you reached switch stand No. 5? A. One car.

Q. One car had been kicked? A. Yes, sir.

Q. And that was the first car on the train?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. And that car was destined to go where, Mr. Seamas. A. No. 9 track.

Q. In other words, that car was supposed to come all the way down here and go into this track here, is that correct? A. Yes, sir.

Q. But it had come to a stop at this point here (indicating)? A. Yes, sir. [23]

Q. And then you proceeded after this car had been kicked——

Mr. Cummins: Excuse me, counsel. Your Honor, this is all repetitious. The plaintiff has already testified to this. I know from information I have received the plaintiff is buying a copy of the record. It is in the record. I object to further repetition. It is all argumentative.

The Court: Well, it is repetitious; I think the ground has been pretty well covered now. If you will bring the witness to the immediate time of the accident, counsel.

Mr. Michael: Yes, your Honor.

Q. Now then, Mr. Seamas, after these two cars had joined together—you said they had coupled, is that correct? A. Yes, sir.

Q. And that means the cars had joined together?

A. Yes, sir.

Q. And at that time you then proceeded to walk to the east end of this second car.

Mr. Cummins: I will object; ground that it is leading and suggestive as well as repetitious.

The Court: Where did you walk immediately after?

(Testimony of Joseph John Seamas.)

A. To the east end of the northeast end of the car.

Q. (By Mr. Michael): And then did you walk to the west end of this first car to check the brake?

A. Yes, sir, I did, sir.

Q. Now, Mr. Seamas, you said you climbed up on a ladder on [24] the northwest end of the first box car, is that correct? A. Yes, sir.

Mr. Cummins: I object, if the Court please. I don't want to be unduly obstreperous in this case, your Honor, but this has been a series of leading questions. I object to it.

Mr. Michael: The only reason I am questioning this way, your Honor, is just for the purpose of clarification. If they are leading, I am certainly sorry.

The Court: You may proceed, and try to avoid any repetition.

Mr. Michael: Yes, your Honor. Thank you.

The Court: The position of the plaintiff on the last question was on the car, on the ladder; is that correct?

Mr. Michael: Yes, your Honor.

The Court: And then what happened?

Q. (By Mr. Michael): Then what happened, Mr. Seamas?

A. I went up the side of the ladder, and just as I was stepping on the brake platform, I was knocked off.

Q. Mr. Seamas, at this time were the members

(Testimony of Joseph John Seamas.)

of the crew who were standing on the ground carrying lanterns? A. Yes, sir.

Q. And were you carrying a lantern?

A. Yes, sir.

Mr. Michael: May this be marked for identification?

The Court: So ordered.

(The lantern referred to was marked plaintiff's exhibit [25] No. 1 for identification.)

Q. (By Mr. Michael): Now, Mr. Seamas, I show you a lantern which has been marked as plaintiff's exhibit No. 1 for the purposes of identification and ask you if that is the type of lantern you had in your hand? A. Yes, sir.

Q. Is this the type of lantern the rest of the crew were using, do you recall?

A. Well, similar to that, the same as that.

Q. The same general type lantern?

A. Yes, sir.

Q. And as you climbed on the car how did you carry this lantern, Mr. Seamas?

A. Pass it to me, please.

(The lantern was passed to the witness.)

The procedure going up a ladder to avoid anything that you have on like that, so you can grab hold of your grabirons to get support and continue right up the way you are going to climb on the ladder, and that is the way I use them going up, to see where your foot goes and you can see where you are going to grab with your hand.

(Testimony of Joseph John Seamas.)

Mr. Michael: Your Honor, may be have that offered in evidence?

The Court: It may be marked in evidence.

(The lantern was thereupon marked plaintiff's exhibit No. 1 in evidence.) [26]

Q. (By Mr. Michael): Now at the time this accident took place, or at the time that you were injured, Mr. Seamas, how far could you see a person moving about?

A. You could see the light about 40 or 50 feet.

Q. And could you see anyone at any distance if he didn't have a light? A. No, sir.

Q. Now when you were climbing up the side of this boxcar did you hear any whistles from a train?

A. No, never.

Q. Did you hear any bells? A. No, sir.

Q. And what type of engine was being used by the crew at that time?

A. A Diesel electric.

Q. A Diesel electric? A. Yes, sir.

Q. Is that a quiet moving engine?

A. Yes, sir.

Q. Do you know whether any signals were given to the engineer at any time to move the engine?

A. No, sir.

Q. Now, in your estimation, Mr. Seamas, how far had you climbed up this boxcar at the time that you were knocked off? How high had you climbed up? [27] A. About 10 to 12 feet.

Q. About 10 to 12 feet. And is the brake plat-

(Testimony of Joseph John Seamas.)

form on the same side of the car that the ladder is?

A. It is on the end—northwest end of the car.

Q. I see. And how were you able to go from the ladder to the brake platform? What procedure do you have to go through?

A. The car right on the corner has got a grabiron on sort of a V shape where you grab onto it on top, hooked around what they call a grabiron, and hang on with both hands. I went to step down, and it is just about opposite the second to the last grabiron on the ladder, the platform was.

Q. What do you do, grab with one hand and fling over with the other or do you step around the edge of the car? A. You step around.

Q. You spoke of a brake platform. Is that a platform that is built out from the edge of the car?

A. Yes, sir.

Q. Is that large enough for a person to stand on?

A. Yes, sir.

Q. When you were knocked off of this boxcar did you feel a sudden jar, or was there a movement of the car?

A. It happened so fast, sir, I didn't know what happened.

Q. And how far did you fall from the edge of the car on the brake platform to the ground? Approximately what distance?

A. From 10 to 12 feet. [28]

Q. Ten to 12 feet. What happened to the car that you fell off of?

A. They rolled on into track No. 9.

(Testimony of Joseph John Seamas.)

Q. And approximately where did they roll into track No. 9, Mr. Seamas?

A. Well, the easterly car was just near the circle there, the east end of the second car.

Q. The easterly car was near this circle?

A. Yes, sir, the east end of it.

Q. In other words, it rolled down a path like this and went in; is that correct? A. Yes, sir.

Q. And the east end of the car was in approximately this position; is that about correct?

A. Yes, sir.

Q. And these cars were coupled together?

A. Yes, sir.

Q. And did they roll together?

A. Yes, sir.

Q. Do you know what the distance is from approximately this position to this position, Mr. Seamas (indicating)? A. Well——

Q. Just roughly.

Q. Between each one of those switch stands it is around near—a baggage car fits in between the both of those switch stands, [29] so a baggage car is around 75 or 80 feet long, and I would say about a little over 300 or 400 feet.

Q. The cars then rolled approximately 300 feet?

A. Yes, sir.

Q. Just roughly. Now where did you fall when you landed on the ground, with respect to the tracks or the cars?

A. It was either No. 7 track or No. 6 track, in between the both tracks; I don't recall.

(Testimony of Joseph John Seamas.)

Q. You fell to the north or to the south of the car? A. To the north.

Q. We will call this car No. 1 and this car No. 2. Did you fall right beside the car just to the very north of it?

A. I don't know, sir; I know when I landed the other cars came and I thought they were going to get me.

Mr. Cummins: Just a moment; object to what the witness thought.

The Court: Sustained.

Mr. Michael: Just state what happened, Mr. Seamas.

A. It happened so quick, when I landed on my hands and knees between the both tracks that the cars roll on, I felt the other wheels of the other three cars that the engine had, or they were either coming on top of me or whether they were going by me, I didn't stop to think. I tried to get up in pain.

Q. Did you hear these cars roll down here? Did you hear the [30] cars moving, cars 1 and 2?

A. Those two cars they went down. I seen them go down when I was in the air.

Q. You fell in this position approximately here, is that correct? A. In there some place.

Q. Just the general area. Now in which position did you land in when you reached the ground, Mr. Seamas? A. On my hands and knees.

Q. And did you land more so on your knees or on your hands?

(Testimony of Joseph John Seamas.)

A. I don't know, it happened so quick.

Q. And do you recall the makeup of the ground that you landed on, what it was like? What was the nature of the ground that you fell on, do you recall? A. Rough.

Q. Rough? A. Yes.

Q. Do you recall the texture of the ground? Was it dirt, or what was its makeup, do you remember? A. Dirt.

Q. Dirt? A. Yes.

Q. Was it level, smooth, rough?

A. Rough.

Q. It was rough. Were you knocked unconscious when you [31] struck the ground?

A. No, sir.

Q. Mr. Seamas, how long did you remain on the ground, do you recall?

A. I don't know; I tried to get up right away.

Q. And were you able to get up right away?

A. In pain, yes, sir.

Q. You state you were able to get up with pain. Did you experience this pain when you landed on the ground?

A. Burning pain from my knees on up to the small of my back.

Q. And when you stood up, when you got up from the ground, did you still experience this pain in your legs and your back?

A. Yes, sir, all the time.

(Testimony of Joseph John Seamas.)

Q. After you stood up, what happened, Mr. Seamas?

A. The cars came to a stop and I came over to the south side of the back lead.

Q. Which car came to a stop?

A. The cars—the three cars that the engine had a hold of.

Q. In other words, these cars had come up here and stopped beside you? A. Yes, sir.

Q. They were approximately the position that cars 1 and 2 were before?

A. About in that position. [32]

Q. Then what happened, Mr. Seamas?

A. I crossed over to the south side of the track.

Q. Did you have any conversation with any person at that time? A. With Mr. Mahan.

Q. And what did you say?

A. He asked me, he said, "Are you hurt, son?" I said, "My legs and back are pretty sore."

Mr. Cummins: Pardon me; I think there should be more foundation laid, your Honor, as to who was present.

Q. (By Mr. Michael): Who else was present at that time, Mr. Seamas?

A. The pinpuller, he was just a little easterly from me, and Mr. Mahan.

Q. Was anyone else present?

A. No, I didn't see no one else. There was two lights—Mr. Mahan's and his light.

Q. What did Mr. Mahan say to you?

(Testimony of Joseph John Seamas.)

A. "Are you hurt, son?" I said, "No; I feel pretty sore."

Q. Then did you remain on the job after you were injured, Mr. Seamas?

A. I remained on the job but—remained on the crew but the crew finished up.

Q. Did you do any switching?

A. No, sir, I just remained on the job.

Q. Why didn't you continue to do any switching? [33] A. I was in pain.

Q. How long did the crew continue to work after you were injured?

A. Oh, about 30 or 40 minutes.

Q. And what happened after the crew had finished work?

A. We rode down about 45 or 50 car lengths down through one of the tracks to the yard office on the engine; all the crew went down with a light engine.

Q. And then I take it you went home?

A. No, sir, the foreman and my partner, Mr. Mahan, and Mr. Weith and the engineer and the fireman got off the train after we got down there and they went down to what we call the switchmen's locker room where we keep our lanterns and our clothes and I went upstairs to the yardmaster's office where we register to go on duty and off duty. And I asked Mr. Ellis, the yardmaster, if that was that for the day. He looked at his watch, and he says, "Yes, Joe, that's it; you fellows can go." Then I went downstairs into the locker room.

(Testimony of Joseph John Seamas.)

Q. How did you get home that night, Mr. Seamas? A. I drove my car home.

Q. And who was with you at that time?

A. Well, Mr. Weith—I gave him a ride from the switch shanty on up to the place where he was rooming. He offered to have me stop in to have a cup of coffee and I told him also——

Mr. Cummins: Objected to—— [34]

The Witness: I can't——

Mr. Cummins: Objection.

Mr. Michael: Just a minute, Mr. Seamas.

Mr. Cummins: Of course, Mr. Weith being another switchman, in the same capacity as he is, there is no proper foundation laid; it is incompetent; object to it.

The Court: Objection sustained.

Q. (By Mr. Michael): Mr. Seamas, approximately what time did you arrive home?

A. Eleven o'clock.

Q. Around eleven o'clock? A. Yes, sir.

Q. Did you go to bed at that time?

A. No, sir.

Q. What was your physical condition at that time?

A. Very bad, sir. I couldn't take my shoes off. I got home; my wife and the little dog were waiting for me in the garage, and she had to help me out of the car into the house and remove my shoes. I called the yardmaster and told him—Mr. Ellis—Mr. Jim Ellis—and he suggested me immediately to get a hold of a doctor and to make a report.

(Testimony of Joseph John Seamas.)

Q. You say you called Mr. Jim Ellis. And who is he? A. He is our yardmaster.

Q. Is he employed by the Santa Fe Railroad?

A. Yes, sir. [35]

Q. And had you made any other report of your injury prior to this time? A. Yes, sir.

Q. Who had you made any——

A. Just before I—right after I came down from the yardmaster's office, all five of us were in the switchmen's locker room, which is a small square the size (indicating), I made the statement, "What are you fellows trying to do, kill me?" They all snickered. I showed them my knee and one of the boys made a remark, "Well, are you going to make an accident report?" I said, "There might be nothing to it; it will save a lot of unnecessary writing." And I didn't think—we make a fall once in a while, or stumble; oh, well, it is nothing. I said, "If I don't feel any better by the time I get home, or by morning, I will notify the yardmaster to tell youse to make a report of the injury." Then Mr.—I gave Mr. Weith a ride home then.

Q. Now when you arrived home did you call a doctor? A. Yes, sir.

Q. And what was his name?

A. I tried to get Dr. Wiess, a company doctor, through the physician's office, and he wasn't home, or he couldn't be located; also Dr. McNeal, our physician's doctor, so my wife was kind of sick over everything, and she got hold of our neighbor

(Testimony of Joseph John Seamas.)

to try to locate a doctor. So we contacted Dr. Lucky. [36]

Q. Is he from Stockton? A. Yes, sir.

Q. And did he come out to your house to see you?

A. No, sir, he was at a Christmas party and Mr. Patterson got a hold of him through the physician's office and he was down—he came down to his office; he left the Christmas party, came down to his office to give me aid.

Q. Who is Mr. Patterson, Mr. Seamas?

A. My neighbor.

Q. He is your neighbor? A. Yes, sir.

Q. And did you see Dr. Lucky in his office?

A. Yes, sir.

Q. At approximately what time did you see Dr. Lucky, do you recall?

A. Around twelve o'clock that night.

Q. Twelve o'clock that night?

A. Yes, sir.

Q. And what type of treatment did he give you?

A. Well, he taped me up, taped my knee and gave me some quinine tablets to take to relieve pain —a prescription.

Q. Would you like a glass of water, Mr. Seamas?

A. Please.

(A glass of water was handed to the witness.)

Q. Do you care for more? [37]

A. No, that's fine.

(Testimony of Joseph John Seamas.)

Q. You say he taped your back, Mr. Seamas?

A. Yes, sir.

Q. And what parts of your back did he tape?

A. The lower part of my back.

Q. The lower part? A. Yes, sir.

Q. And did he tape the front of your body?

A. No, just in the back—the small of my back.

Q. And then did you return home?

A. We got—had a prescription to get some tablets, and then I went home.

Q. And how did you go home?

A. Mr. Patterson took me home.

Q. When you returned home did you go to bed, Mr. Seamas?

A. I did, but I didn't stay in bed long. I couldn't; I laid on the floor.

Q. You laid on the floor? A. Yes, sir.

Q. Why did you lay on the floor?

A. To get relief.

Q. And did you attempt to sleep on the bed?

A. I tried it but I have never been able to——

Q. Were you able to sleep that night?

A. No, sir. [38]

Q. On what type of bed were you sleeping at that time, Mr. Seamas?

A. We had just bought a new Sealy mattress—the wife bought it for me for my birthday, a new Sealy Sleep-Easy mattress, double bed.

Q. Now, Mr. Seamas, when was the next time you saw a doctor?

(Testimony of Joseph John Seamas.)

A. The next morning Dr. Wiess came out after my wife called him.

Q. And how did you feel the next morning?

A. It felt to me like I was worse, in pain.

Q. And where did you experience these pains?

A. Between my knees and throughout my back.

Q. Were they the same general type of pain that you experienced the night before? A. Worse.

Q. They felt more aggravated?

A. Yes, sir.

Q. And did the taping of the back help you any?

A. A little relief.

Q. Did the tablets you were given help you any?

A. Relieved the pain.

Q. You stated you saw the doctor on Sunday, and that was the next day? A. Yes, sir.

Q. And what was the name of the doctor? [39]

A. Dr. Wiess, our company doctor.

Q. What do you mean, "company doctor," Mr. Seamas? A. Well, our Santa Fe doctor.

Q. Is he from Stockton? A. Yes, sir.

Q. Did he examine you on Sunday?

A. He gave me a little examination and ordered me for X-rays next day.

Q. Where did he examine you, Mr. Seamas? At your home or in his office? A. At my home.

Q. At your home. And did he give you any type of treatment?

A. He gave me some capsules, I think—pills, and he told me to exercise my arms and my legs, bend

(Testimony of Joseph John Seamas.)

them, and to lay on a hard bed. So I told him I was laying on the floor.

Q. Did he offer you any other type of treatment at that time?

A. No, sir; he had me X-rayed the next morning.

Q. And that would be on Monday following the Saturday that you were injured? A. Yes, sir.

Q. Did Dr. Weiss also examine you on Monday, Mr. Seamas? A. No, sir.

Q. You just had the X-rays ordered?

A. Yes, sir.

Q. And did you have those X-rays taken? [40]

A. Yes, sir.

Q. And when was the next time you saw the doctor?

A. Every day up until about January the 2nd or 3rd.

Q. And which doctor were you seeing?

A. Dr Wiess.

Q. You continued to see Dr. Wiess?

A. Yes, sir, every day.

Q. And during those days what type of treatment did he give you? A. Heat treatment.

Q. Is that the only type of treatment?

A. He gave me a shot with a needle; I don't know what it was.

Q. And did that treatment afford you any relief?

A. Temporary relief.

Q. And what was your physical condition during that period that you saw Dr. Wiess?

(Testimony of Joseph John Seamas.)

A. The same.

Q. Did you experience the same type of pains?

A. Yes, sir.

Q. Down your legs and the lower part of your back? A. Yes, sir.

Q. And did the pains increase in feeling or did they become lesser?

A. After the heat treatment was worn out they would continue [41] on the same ache.

Q. You mean that this heat treatment would give you some type of relief? A. Yes, sir.

Q. And how long would that last?

A. Oh, about four or five hours.

Q. And then the same things would re-occur?

A. Yes, sir.

Q. And how long did you continue to see Dr. Wiess, Mr. Seamas?

A. Up until January the 2nd when he released me to go to the Santa Fe Hospital in Los Angeles.

Q. And did you go to the Santa Fe Hospital in Los Angeles? A. No, sir.

Q. And why not, Mr. Seamas?

A. Well, he gave me——

Mr. Cummins: Just a minute; I don't know that "why not" is material or relevant to this case. Object to it on that ground.

The Court: Overruled. You may answer.

A. Dr. Wiess gave me an entering form to the Coast Lines Hospital in Los Angeles, and Mr. Johnson gave me a pass with a permit to ride on our streamliner.

(Testimony of Joseph John Seamas.)

Mr. Cummins: Just a minute.

Mr. Michael: Just a minute, Mr. Seamas.

Mr. Cummins: This is the reason, your Honor, I objected [42] to the question. I felt I knew what was coming. I repeat my objection; it is immaterial and irrelevant why he didn't go to Los Angeles.

Mr. Michael: Mr. Seamas, without going into—excuse me, your Honor, if I may, perhaps I can instruct him not to answer as to what took place but just the reason he didn't go to Los Angeles. Just say why you didn't go to Los Angeles, Mr. Seamas.

A. Because I was told not to and informed not to by our claim adjuster and our trainmaster, Mr. Anderson, and Mr. Wilson.

Mr. Cummins: I move to strike that as incompetent.

The Court: The motion is granted.

Q. (By Mr. Michael): At this time did you see any other doctors, Mr. Seamas?

A. Dr. Lucky, by the request of Mr. Anderson of the Santa Fe.

Q. And do you recall when you went to see Dr. Lucky?

A. On the afternoon of January the 3rd.

Q. That would be of 1951, of course?

A. Yes, sir.

Q. What treatment did Dr. Lucky prescribe?

A. Traction.

Q. What do you mean by traction, Mr. Seamas?

A. He strapped—he taped my legs from just

(Testimony of Joseph John Seamas.)

about the knees down to my ankles, and had weight —15 pounds weight pulling on my legs and on bed boards. [43]

Q. And where did this traction take place?

A. At the St. Joseph's Hospital.

Q. At the St. Joseph's Hospital?

A. Yes, sir.

Q. Who sent you to St. Joseph's Hospital?

A. The Santa Fe Company.

Q. Which doctor? A. Dr. Lucky.

Q. Dr. Lucky sent you to St. Joseph's Hospital?

A. Yes, sir.

Q. How long did you remain in St. Joseph's Hospital?

A. From January 3rd until January the 19th.

Q. And during that time were you receiving this treatment that you spoke of as traction?

A. About 11 or 12 days of it.

Q. Did Dr. Lucky take any X-rays of you at this time? A. No, sir.

Q. Were any X-rays taken of you in the hospital? A. No, sir.

Q. Do you know of your own knowledge whether Dr. Lucky has an X-ray machine in his office?

A. Yes, sir.

Q. And were any X-rays of you taken in Dr. Lucky's office? A. No, sir.

Q. Did you receive any other treatment in the hospital, Mr. [44] Seamas?

A. Heat treatment and rubbing my back.

(Testimony of Joseph John Seamas.)

Q. And did that heat treatment or the treatment with traction afford you any relief?

A. I was—it gave a little—I was relaxed with it.

Q. Were you confined to bed all the time you were in the hospital?

A. Up to the last two days.

Q. And then were you able to get out of bed?

A. Yes, sir.

Q. Were you able to walk around at that time?

A. Yes, sir, experiencing pain.

Q. Did the doctor give you anything to help you walk at that time—prescribe any aids of any kind?

A. He gave me a little corset and told me to wear a little corset.

Q. A corset? A. Yes, sir.

Q. And will you describe this corset?

A. Well, it is a steel—made of steel bracing; it is about that high and about that—about that wide and about that round, fits around the small of my back to give me relief.

Q. Does that wrap around the complete part of your body? A. Yes, sir.

Q. And are there straps to adjust it to fit your body? A. Yes, sir. [45]

Q. And how long did you continue wearing this back brace or corset? A. I still got it.

Q. You still have it? A. Yes.

Q. Have you been wearing it since the time the doctor prescribed it for you?

A. Yes, sir. I have.

Q. Does that afford you any relief?

(Testimony of Joseph John Seamas.)

A. Yes, sir, it does.

Q. And how do you feel when you take this brace off? A. Very weak and in pain.

Q. Do you go to bed with this back brace?

A. No, sir.

Q. You take it off at night? A. Yes, sir.

Q. Do you wear it continually during the day?

A. Yes, sir, I do.

Q. Now, after your release from the hospital were you under the care of a doctor?

The Court: How long a period was he in the hospital?

Mr. Michael: Your Honor, he was in the hospital for approximately 12 days.

Q. What date were you released from the hospital, Mr. Seamas? A. January the 19th. [46]

Q. January the 19th. And after your release from the hospital did you remain under the care of a doctor?

A. Under the care of Dr. Lucky, yes, sir.

Q. And did you go to his office for examinations?

A. Every day when I could.

Q. For how long a period?

A. About a month and a half every day.

Q. And after the month and a half did you continue to go to Dr. Lucky?

A. Every other day.

Q. Every other day? A. Yes, sir.

Q. How long did you continue to go to him every other day?

(Testimony of Joseph John Seamas.)

A. About a month and a half.

The Court: What sort of treatment was accorded him?

Mr. Michael: I'm sorry, your Honor.

The Court: What treatment was accorded him when he went to the doctor's office? What happened? What did they do?

Q. (By Mr. Michael): What type of treatment did you receive when you went to the doctor's office, Mr. Seamas? A. Heat and rubbing treatment.

Q. That was for a period of three months?

A. Yes, sir.

Q. And did you continue to go to Dr. Lucky after this period of three months? [47]

A. Yes, sir, I have.

Q. During this period did Dr. Lucky ever give you a physical examination, Mr. Seamas?

A. Once or twice he just looked me over.

The Court: Were X-ray photographs taken?

Mr. Michael: No, he testified that no X-rays were taken by Dr. Lucky, your Honor. I will ask him again if the Court would like.

The Court: Have X-rays been taken?

Mr. Michael: Yes, X-rays have been taken by other physicians, your Honor.

Q. Now, Mr. Seamas, did Dr. Lucky ever give you any physical tests like having you bend down or stoop over? A. Once.

Q. And how did you feel during this period of time? A. The same thing as I feel now.

(Testimony of Joseph John Seamas.)

Q. Did you ever use any crutches during this period? A. No, sir, I never did.

Q. Have you ever used any crutches since the day of your injury? A. No, sir.

Q. Have you ever used any crutches at any time during your lifetime, Mr. Seamas?

A. Not that I remember.

Q. During the time that you were going to Dr. Lucky were you [48] able to bend over in a forward position and touch the ground like this (illustrating)?

A. I bend over, a little over, but experience pain.

Q. Where would you experience this pain?

A. The same location, in the small of my back.

Q. You continually have this pain in the small of your back? A. Yes, sir.

Q. Were you able to bend backwards at all like this? A. I tried; I experienced pain.

Q. You experienced the same type of pain?

A. Yes, sir.

Q. Were you able to bend back at all?

A. Very little; I tried it.

Q. Very little. Were you able to move your legs freely? A. No, sir.

Q. At this time did you use a cane or anything to help you walk? A. Yes, sir, I did.

Q. How long did you use this cane, do you recall?

A. Well, I used the cane about four or five months; I don't quite remember; I used it occasionally once in a while on rough ground. I tried to get away from it.

(Testimony of Joseph John Seamas.)

Q. Did you later get rid of the cane?

A. Yes, sir.

Q. At whose suggestion was that? [49]

A. Dr. Lucky's and Dr. McCoy's suggestion.

Q. They told you to get rid of the cane?

A. Yes, sir.

Q. Were you able to walk at this time?

A. Very slow, experienced pain all the time.

Mr. Michael: Your Honor, if the Court would care to take the recess at this time——

The Court: We will take the afternoon recess, a short recess, ladies and gentlemen, with the same admonition not to discuss the case under any conditions.

(Recess.)

Q. (By Mr. Michael): Mr. Seamas, before we go on to the—your testimony as to the other doctors you have seen, I would like to clarify just one point which is a little confusing, I believe, in my mind and perhaps in the mind of the Court and the jury. When you stepped up, or rather climbed up the ladder of this first car to check this hand brake, what caused you to fall, do you know?

A. I guess it was the three cars and the engine that hit the two cars I was on.

Q. And they struck that car, these two cars that you were on, and did they strike you with any degree of force?

A. It must have been, because it cut pretty hard. The impact was pretty hard.

(Testimony of Joseph John Seamas.)

Q. Is that what caused you to fall to the [50] ground? A. Yes, sir.

Q. That impact? A. Yes, sir.

Q. I see. Now, you have stated earlier that Dr. Lucky sent you to the hospital for several months following that, that you remained under his care, and that you visited him at various periods of time, is that correct? A. Yes, sir, it is.

Q. Now, what other doctors have you seen, Mr. Seamas? A. Dr. Dickson.

Q. Who sent you to Dr. Dickson?

A. The railroad company.

Q. How many times did you see Dr. Dickson?

A. Once.

Q. Where is Dr. Dickson located?

A. In Oakland.

Q. Do you recall when you saw him?

A. In February sometime.

Q. February. Did he give you an examination?

A. He gave me an examination and also taken X-rays.

Q. What type of examination did he give you?

A. Physical examination.

Q. Will you just describe what that examination consisted of, just in your own words?

A. He examined my limbs, limb by limb. My legs, leg by leg. [51] My arms, my back, and he took all my clothes off, took a very severe—punctured me in the back with needles for locations where the pain existed and on my legs, my feet, and also took a blood test.

(Testimony of Joseph John Seamas.)

Q. Did he take any X-rays at that time?

A. Yes, sir.

Q. Did he give you any type of treatment to follow?

A. He told me to carry on with Dr. Lucky's treatments.

Q. What other doctors have you seen?

A. Dr. McCoy.

Q. Where is Dr. McCoy located?

A. He is here in San Francisco.

Q. How many times did Dr. McCoy examine you?

A. If I remember, five or six times; maybe more.

Q. Did he give you a physical examination?

A. Yes, sir.

Q. How many physical examinations did Dr. McCoy give you?

A. Every time that I went to see him he gave me a physical and took X-rays.

Q. Did he take an X-ray? A. Yes, sir.

Q. Did he have X-rays taken of you each time you went to him? A. Yes, sir, he did.

Q. What did his physical examination consist of, Mr. Seamas? What did he have you do? [52]

A. He told me to exercise and try to walk and lay on a blanket on the floor.

Q. Perhaps I didn't make my question clear. Just describe the physical examination he gave you. What did he do or did he have you do?

A. Well, I undressed and he measured my legs above the knees and below the knees and gave me—

(Testimony of Joseph John Seamas.)
he stretched my legs and my arms and with needles he tried to locate locations on my back where the pain was at and on my legs. Also, I believe, he gave me one or two blood tests.

Q. Did he ask you what type of treatment you were being given? A. I don't remember.

Q. You don't recall. Now, at the present time, Mr. Seamas, do you have any trouble with your back and back of your legs? A. Yes, sir, I do.

Q. And do you experience this same type of pain in the back of your legs and in the small of your back? A. Yes, sir.

Mr. Cummins: Just a moment, I think this is too leading, your Honor. Let the witness talk. Object to it on the ground it is leading and suggestive, the attorney is testifying.

The Court: The witness may testify. You can state the type of pain you suffer so that the jurors may understand and so I may understand.

A. It is a pain that I cannot understand. I can't explain [53] it; in the small of my back, through my back at times. I try to bend over, I try to bend forward, I try to bend backward, and I experience a severe pain. My legs—it is hard to explain. I have tried everything I can to do better, but I can't. That is the best of my knowledge, Judge.

Q. (By Mr. Michael): Mr. Seamas, are you able to lift any objects? A. 15 or 20 pounds.

Q. Are you able to stoop down to pick up anything?

(Testimony of Joseph John Seamas.)

A. If I get down on my hands and knees. Still I experience with pain.

Q. Are you able to walk upstairs?

A. I try it but I experience pain.

Q. Are you able to walk freely?

A. No, sir.

Q. Do you feel—I will withdraw that. Does the change of weather affect you in any manner?

A. It has. Last night it did squarely.

Q. How does it affect you?

A. In the upper portion of my back and on my legs, the lower part.

Q. Are you able to sleep at nights at the present time, Mr. Seamas? A. No, sir.

Q. Were you able to sleep last night? [54]

A. I tried it on the bed, but I had to wind up on the floor with a blanket, at the hotel.

Q. Now, you have spoken several times about sleeping on the floor. Does that give you a little more relief than when you are on the bed?

A. Yes, sir, it does.

Q. How long have you been sleeping on the floor, Mr. Seamas?

A. Ever since the night I was injured.

Q. Now, prior to the time you were injured, what was the condition of your health, Mr. Seamas?

A. Gee, I wish I had it night.

Q. Well, just describe what was the condition of your health. A. Very good.

Q. Were you able to walk freely?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Were you able to go fishing?

A. Go fishing, go dancing, play ball—had a wonderful time.

Q. Since you have been injured have you been able to do these things? A. No, sir, I haven't.

Q. Have you ever been able to do any work since you were injured?

A. No, I haven't, I have pittered around the house to help the wife.

Q. Have you ever attempted to obtain any jobs since the time you were injured? [55]

A. I tried it, but my condition in seeking employment was bad.

Q. Have you ever been injured before, Mr. Seamas? A. A couple of times.

Q. Where were you injured before, what area in the body?

A. Well, I got my back pinched a little.

Q. When did that take place? A. 1939.

Q. Where were you working at that time?

A. For the Santa Fe Company.

Q. How were you injured, Mr. Seamas?

A. Well, we were loading one of these freight barges that we got to haul these cars from Richmond to San Francisco and various points. I was squeezed against—between the pilot house of one of the barges.

Q. And did that cause you to be hospitalized at that time? A. About a month.

Q. You were in the hospital for about a month?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. I assume that caused you to leave your job?

A. Yes, sir.

Q. For that period, a month?

A. I was off until December.

Q. How long were you off your job, Mr. Seamas?

A. Until December.

Q. For how many days, approximately? [56]

A. Oh, about the latter part of August until the middle of December or first part of December.

Q. And that was in 1939? A. Yes, sir.

Q. Did the company pay you for the time that you lost from work? A. They gave me $500.

Mr. Cummins: Just a moment, the question can be answered yes or no, and I will object to any other answer, if the Court please.

The Court: Well, any compensation he may have received in a prior accident would not be material here.

Mr. Cummins: Your Honor, if the answer is in I ask that it be stricken out.

The Court: The answer may go out.

Q. (By Mr. Michael): Mr. Seamas, did you fully recover from this injury? A. Yes, sir.

Q. Were you given a medical examination after this injury? A. Yes, sir.

Q. Who gave you that medical examination?

A. Santa Fe Railroad doctor.

Q. And you were able to return to work?

A. Yes, sir.

Q. Were you injured at any other time? [57]

A. Down at Bakersfield in 1946 or '47, either.

(Testimony of Joseph John Seamas.)

Q. Whom were you working for at that time?

A. For the Sante Fe Company.

Q. What happened at that time, Mr. Seamas?

A. Well, there was a defaulted switch stand and I went to throw it and it sprung across and hit me on the right side of my hip.

Q. Were you hospitalized at that time?

A. About a week or ten days.

Q. Did this injury cause you to lose any time from your job? A. About ten or fifteen days.

Q. Did you fully recover from this injury?

A. Yes, sir, I did.

Q. Were you given a physical examination after this injury? A. Two or three of them.

Q. Who gave you those physical examinations?

A. Well, one was the Sante Fe Company, one was the Southern Pacific Company, and one was the Western Pacific Railroad Company.

Q. And then were you allowed to return to your job after these examinations?

A. Well, prior to these Western Pacific and Southern Pacific examinations, Sante Fe had given one and I returned to that switch stand fully recovered.

Q. Mr. Seamas, what were your daily earnings at the time that [58] you were injured?

A. My daily earnings were $12.26 a day, that is for the eight hours, but——

Mr. Cummins: Excuse me, Mr. Seamas. May I approach counsel? I have handed counsel a complete record in affidavit form from the paymaster.

(Testimony of Joseph John Seamas.)

Mr. Michael: May I have this marked for identification?

The Court: Yes.

The Clerk: Plaintiff's Exhibit No. 2 for identification only.

(Thereupon the affidavit referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Michael): Mr. Seamas, I am going to show you some figures in the form of an affidavit under the heading of the Atchison, Topeka and Sante Fe Railroad Company which sets out the month and the year of—rather, the year and the month of each year and sets out your gross earnings, your deductions, and your total net earnings. Will you glance at that, please? Is that correct?

A. Yes, about, possibly. I have got some stubs at home in my checks. That was the rate.

Q. Mr. Seamas, on November of 1950 they have your gross earnings for that month in the sum of $351.38. Now, is that correct to the best of your knowledge?

A. It is the best of my knowledge. [59]

Q. And from the period of November, 1950, to December, 1950, did you receive the same rate of pay?

A. I received the same rate of pay up until I was injured, just approximately about the same. It was nine days—I don't usually lay off. I was working on a seven day job. I don't usually lay off.

(Testimony of Joseph John Seamas.)

Q. Would it be correct for me to state that in December of 1950 you were earning approximately $351.38 per month? A. In November?

Q. In December of 1950.

A. I believe I would have earned a little more because I was about to enter a foreman's job which a man my junior is working now, bringing it up a little higher—bringing it around—not quite $400.

Q. I note here, Mr. Seamas, that in September of 1950 you earned $516.24 and in October you earned $387.38 per month, and in November $351.38. What is the cause of that fluctuation?

A. Well, our jobs, when I can work a job as a foreman, I work the job as a foreman since way back in 1939. When I can hold the job as a foreman I take a job as a foreman. That is the difference of $12.21 to $13.11 and on that other situation that brought up to—will you repeat that, $400 or $500?

Q. In September you were earning $516.24 a month?

A. Yes, sir. That was caused—we are allowed a two week vacation and we have got 800 full days then, and I was only [60] allowed one week. I had to work the other week which—which the company was compensated on and I got paid. I got my two weeks vacation in with that $500.

Mr. Michael: Will the Court excuse me while I show this to my associate?

The Court: Yes.

Mr. Michael: Your Honor, may we offer this in

(Testimony of Joseph John Seamas.)

as evidence, this affidavit submitted by the Sante Fe Company, to show that the plaintiff from December, 1949, to November, 1950, earned $4,477.19?

The Court: It may be marked in evidence.

The Clerk: Plaintiff's Exhibit No. 2 in evidence.

(Thereupon the affidavit referred to was received in evidence as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Michael): Mr. Seamas, at the present time are you able to work as a switchman?

A. No, I wish I could.

Q. And have you received any pay since the date of your accident from the company?

A. Back pay that was retroactive to us, and my vacation pay.

Q. And have you done any work for pay since the day of your injury? A. No, I never.

Mr. Michael: I have no further questions, your Honor. [61]

Cross-Examination

By Mr. Cummins:

Q. Mr. Seamas, during the period of time that you were not working for the Sante Fe from 1947 until 1949, what did you do with your time?

A. Sir, your answer is wrong on that 1947 to 1949.

Q. Well, if I misquoted you, please correct me.

A. Oh, I beg your pardon, it was my fault. I was thinking of something—that was when I was removed from service.

(Testimony of Joseph John Seamas.)

Q. That is what I am asking you about.

A. On August 9 of 1947 I seeked employment on the Southern Pacific at Tracy, California. Mr. O. E. Underhill, our trainmaster on the Southern Pacific from the Western Division asked me, "Lad——"

Q. Just a moment, Mr. Seamas. What I want to know is, did you work? What did you do with your time? I am not asking you for conversations with persons unknown to me. Were you employed during that period?

A. I was employed by the Southern Pacific from August 19, 1947, until I was refused employment on November 10th by the Southern Pacific.

Q. Did you work for anyone else then during that two year period?

A. Yes, sir. I then filed application on the Western Pacific on November 13th, hired out as a switchman on November 13th, passed my physical examination and worked for the Western [62] Pacific Railroad Company on the Western Division out of Stockton, California, as a switchman until I was reinstated by the Sante Fe in April.

Q. What period of time, if any, Mr. Seamas, were you unemployed between 1947 and 1949?

A. From the 11th day of August of 1947 was when my name was removed from the Sante Fe switchmen's roster in Bakersfield, California.

Q. Until when, Mr. Seamas?

A. Until I was reinstated in the month of April, 1949, or May.

(Testimony of Joseph John Seamas.)

Q. Mr. Seamas, I am sorry that I didn't make my question clear to you, sir. What period of time during the two years, 1947 to 1949, were you unemployed, is my question?

A. Unemployed—none.

Q. You weren't unemployed a day or a week or a month?

A. No, sir, I always seeked employment around when I was working or cut off the extra board on the Western Pacific.

Q. The day the Sante Fe let you out, the following day you went to work for another railroad, sir?

A. No, sir, I wasn't notified until the 18th day of August.

Q. Now what kind of work did you do for the Southern Pacific and for the Western Pacific?

A. Switchman, engine foreman.

Q. What is your total experience in years as a switchman, Mr. [63] Seamas?

A. Fourteen actual years.

Q. You have actually worked as a switchman for fourteen years?

A. From May 1, 1937, up until December 9th, when I was injured, I worked as a switchman and was used as a brakeman occasionally on the Valley Division.

Q. A brakeman does substantially the same kind of work as the switchman, does he not?

A. No, sir.

Q. Well, all right. You tell us the difference.

A. A brakeman is the man that runs out on

(Testimony of Joseph John Seamas.)

trains that the switchmen make up for him to take out. A switchman receives the cars that the brakeman, the conductor, bring into the yard with their trains.

Q. He is a comparable person in the train crew, isn't he; the brakeman is comparable to the switchman in a train crew except that the switchman works in the yard and the brakeman out on the line? Is that substantially correct, sir?

A. Yes, sir.

Q. All right. In any event, your total experience for the Santa Fe, the Southern Pacific and the Western Pacific have all been in the capacity of either switchman or brakeman; is that not correct, sir? A. Yes, sir.

Q. All right, thank you. Now, isn't it so, Mr. Seamas, that [64] the engineer and the fireman interchange jobs because that is the way a fireman gets to be an engineer, through practical experience under the supervision of the engineer?

A. That is not my duties. I wouldn't know.

Q. Thank you. You were telling us on your direct examination that the engineer usually runs the train, but that the fireman sometimes does. You do know about that, don't you? A. Yes, sir.

Q. And you do know, then, that the fireman occasionally runs the engine, don't you?

A. Yes.

Q. Now, you have told us in some detail, Mr. Seamas, precisely the moves that you made leading up to your alleged accident. You have told us that

(Testimony of Joseph John Seamas.)

you moved into the rip track and that you moved out, that you stepped off at the No. 9 switch, that from that point you walked up to the S-2, the No. 3 switch, and from there you walked to S-3 down here (indicating), where the cars were being coupled, and that subsequent to that you walked on the north side of the cars and had climbed up on the northwest corner of the westernmost car, and you gave us the details of how these cars were shoved down the track—kicked, I believe you used the word. Now, Mr. Seamas, can you tell the jury the move that was made after the alleged accident took place in equal detail?

A. After I was knocked off? [65]

Q. Yes.

A. Mr. Mahan and Mr. Weith put the balance of the cars away, reached down into track No. 9 and got that car out of the track No. 9 that was to go to No. 6 and put the cars in their proper tracks.

Q. What were you doing during that time?

A. If I recall, I was riding on the platform of the engine.

Q. All the time after the alleged accident took place you were riding on the front footboard of the engine?

A. The back footboard on the platform—not the footboard, the platform.

Q. In any event you were riding on the engine at all times after this accident took place?

A. No, sir.

(Testimony of Joseph John Seamas.)

Q. Did you throw any switches after the accident? A. No, sir, I couldn't.

Q. Did you do any work at all after the accident?

A. I rode that car into the California Traction track.

Q. Did you tie the handbrake?

A. I took it to a rest.

Q. Did you tie the handbrake?

A. I left the handbrake on it.

Q. Sir? A. I left the handbrake set on it.

Q. By that did you mean that you tightened the handbrake, sir? [66]

A. No, sir, I wound it around. It was one of those easy-turning ones.

Q. But you did set the handbrake on that car?

A. Yes, sir, with pain I did.

Q. You did it, but with pain? A. Yes, sir.

Q. Now, did you do any other work?

A. No, sir.

Q. That is all the work that you recall that you did after this alleged accident took place?

A. That was all the work I done, yes, sir.

Q. How far did you ride that car?

A. Right down about opposite that curve there. See where that little mark is on track No. 2?

Q. What track, Mr. Seamas?

A. That track was the Traction track. It is the track north of the main line. None of those tracks.

Q. Not on any of these tracks (indicating)?

A. No, sir.

(Testimony of Joseph John Seamas.)

Q. How did you get to the brake platform, Mr. Seamas?

A. Mr. Mahan, when we reached down to get the other car, him and I were standing by. He said, "We will set that head car over to the tracks."

Q. Mr. Seamas, I don't want to disrupt your train of thought, but I asked you how did you get up to the brake platform? [67]

A. I am trying to tell you, sir. Mr. Mahan and I walked up to the brake on the head car and I climbed up the southeast end of the refrigerator car that was going into the tracks.

Q. By yourself, sir?

A. Yes, sir, with pain.

Q. And you also turned the wheel as you told the jury, with pain? A. Yes, sir.

Q. But you did turn it? A. I turned it.

Q. Now, to be absolutely correct about whether or not you worked after the accident, you did do that particular job after the accident. Now, did you do any other? A. No, sir, I never.

Q. You are sure of that?

A. I am positive, I am positive.

Q. Of course, you told the other members of the crew, Mr. Mahan and Mr. Weith, the pinpuller, that you had hurt your back, hadn't you?

A. I did, yes, sir.

Q. That is immediately after the accident happened, too, isn't it, Mr. Seamas?

A. As soon as they got down to that location they were standing at.

(Testimony of Joseph John Seamas.)

Q. There isn't any question in your mind but what you told [68] both of those gentlemen that you had been hurt, and that you had hurt your back immediately after this alleged accident happened, is there? A. They asked me.

Q. All right. Where is Mr. Weith now, Mr. Seamas? A. I don't know.

Q. Have you called on him or have you seen him him since this accident happened?

A. I seen him once.

Q. Where is Mr. Mahan now, Mr. Seamas?

A. I don't know.

Q. You called on him about a month after this accident happened with another party and asked him to sign some papers, didn't you?

A. I didn't ask him to sign no papers, sir. I asked him if he would be kind enough to give me a statement, and he says he would give his statements to the president or the superintendent.

Q. Do you know where Mr. Weith is today?

A. I don't know where he is at today.

Q. Do you know what city he is in?

A. He might be in the city. I don't know where he is at.

Q. Now, Mr. Seamas, when you came down from the point marked S-2, which is the No. 3 switch, is this the route that you took marked in red on the north side of the drawing? I don't [69] believe this has been marked for identification or identified, your Honor. Could we call it something?

The Court: For the purpose of illustration call

(Testimony of Joseph John Seamas.)

it the next in order, whatever it may be, Mr. Clerk.

The Clerk: Plaintiff's Exhibit 3 for illustrative purposes only.

(Thereupon the diagram above referred to was marked Plaintiff's Exhibit No. 3 for illustrative purposes only.)

Q. (By Mr. Cummins): This red line that is most northerly, Mr. Seamas, is that the path you took to get to the cars that were being kicked?

A. Yes, sir.

Q. And the first car had already been kicked, had it, when you were walking toward them?

A. The first car had already been kicked when I was getting that No. 5 switch stand.

Q. When you were right here at No. 5 switch, then, the first car had already been kicked. Had it come to a rest or stopped? A. Yes, it had.

Q. What was the other car next to the east doing at that time?

A. I was between 5 and 6 switch stands and seen Mr. Mahan give a kick sign kicking it. I looked at my switch list and hollered at him, "Don't throw that switch," and he didn't. [70]

Q. What switch was Mr. Mahan about to throw?

A. That bull switch.

Q. The main switch here? A. Yes, sir.

Q. Where was the second car—we will call that the second car, it is marked that way, cars 1 and 2, when you yelled to Mr. Mahan?

A. I guess the engine still had hold of it, be-

(Testimony of Joseph John Seamas.)

cause when I hollered at him he had just gotten through giving a kick sign.

Q. Did the car come to a stop then before it reached the switch, the bull switch?

A. No, it came to a coupling on to the car that was to go to No. 9.

Q. What did throwing the switch have to do with that move? It wouldn't have changed anything, would it?

A. It would have caused severe damage or derailment on account of that car that was going into No. 9 track was foul or would have blocked the way of the car that was going to go to No. 6 track if he had of thrown the switch, but he didn't.

Q. Instead of that it came up to an easy coupling, is that right? A. Yes, sir.

Q. Now, where was your next move? Where did you go?

A. I followed the line toward No. 6 track switch stand, which was just opposite the coupling—just a little ways from the [71] coupling of the both cars, and I raised my lantern and seen that the pins had dropped.

Q. In other words, the couple had made between cars 1 and 2 and they were——

A. Coupled up.

Q. Coupled together? A. Yes.

Q. Then what did you do?

A. I went to the east end of the gondola and Mr. Mahan was on the south side of it, and I told him, I says, "Mr. Mahan"—I didn't say "Mr.

(Testimony of Joseph John Seamas.)

Mahan''; I says, "Lem, I am going to go down and check that brake on that first car." That was on the west end of the car that was going to No. 9 that had stopped.

Q. And he said?

A. He says "OK, kid, go ahead."

Q. How far were you standing from Mr. Mahan when you had this conversation with him?

A. Oh, I think about 10, 12 feet; on the opposite side of the—the width of the gondola.

Q. At that time were the cars standing still?

A. They were stopped.

Q. And the engine, too? A. Yes, sir.

Q. And he said to you, "Go ahead," did he?

A. He says "OK, son, go ahead." [72]

Q. There is no question in your mind but what this conversation took place?

A. I know it took place.

Q. Now, Mr. Seamas, at that time how far away was this other cut of cars that later came against these two cars which are marked here on Exhibit 3 for identification?

A. About in the location where they now stand.

Q. Well, how far would that be? Can you give us an idea?

A. Well, the west car that the engine had hold of——

Q. Yes, sir, the westernmost car that the engine had hold of. What is the distance from that to the easternmost car of those two cars?

A. About three to four cars.

(Testimony of Joseph John Seamas.)

Q. Mr. Seamas, you told us before on direct examination that they were about 150 feet. Would that be about three or four car lengths?

A. Yes.

Q. Earlier in your direct examination you told us that you could only see about 40 to 50 feet. How did you then know that those cars were 150 feet away?

A. The light of the pinpuller was up there. That was about my judgment.

Q. There was a light there, wasn't there?

A. The pinpuller was standing just this side of it.

Q. Mr. Seamas, in your direct testimony you told us that you [73] could see a light about 40 or 50 feet. Is it now your testimony that you could see a light 150 feet?

A. Well, sir, that fog is—comes in pockets, and I believe—I won't swear it was 150 feet or it wasn't. I know the cars were up in that location.

Q. Mr. Seamas, you understand that all of your testimony here today is under sworn testimony, don't you? A. I do, sir.

Q. All right. Now, you have worked as a switchman for 14 years. You know then that the engineer operates on the right-hand side of his engine, don't you? A. Yes, sir.

Q. And you know that the engine at the Mormon yard is almost invariably headed in an easterly direction when they are switching these tracks, don't you? A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. And you know also that the engineer is that man that receives signals from the switchman, from the foreman south, on the south side of the train, don't you?

A. On that particular job, yes, sir.

Q. Yet on the day of this accident you were on the north side of the train, weren't you?

A. Yes, sir.

Q. And you climbed the train and the end of the car on the northwest corner, didn't you? [74]

A. Yes, sir.

Q. And at that time you were out of the sight of the switchman and you were out of sight of the engine foreman and they couldn't see you either, could they? A. No, sir.

Q. Because the cars, these two cars were between you and them, weren't they?

A. Yes, sir.

The Court: We might take the afternoon recess if this is convenient to counsel, and adjourn until tomorrow morning at ten o'clock. Ladies and gentlemen, I again admonish you not to discuss the case under any conditions or to form an opinion until the matter is submitted to you.

(Whereupon an adjournment was taken until tomorrow, Tuesday, October 2, 1951, at 10:00 a.m.) [75]

October 2, 1951—10:00 A.M.

JOSEPH JOHN SEAMAS

plaintiff herein, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Cummins:

Q. Mr. Seamas, I think we were speaking yesterday evening just before we adjourned about your being on the north side of the cut of cars. Now, the tracks curve, all of these tracks curve so that they are concave. Do you understand the term "concave"? A. No, I don't.

Q. All right. Let's put it this way. All these tracks at the Mormon yard, these switch leads that you use, curve so that in order for you, as a switchman, to see very many car lengths to the engine you have to be on the south side of a cut of cars, don't you? A. Yes, sir.

Q. If you are on the north side the curvature of the track cuts off your view of the engine and you can't pass signals there, can you?

A. No, sir.

Q. The only way that the engineer or the fireman, either one, would know that you were on the north side of the cut would be on a signal passed by somebody on the south side, wouldn't it? [76]

A. Yes, sir.

Q. And the only way that any members of the crew would have to know where you were if you

(Testimony of Joseph John Seamas.)

were on the north side would be if you told one of them that you were going on the north side and going up on a car on the north side, isn't that so?

A. Yes, sir.

Q. So that if you didn't tell Mr. Mahan that you were going up on top of one of these cars he might not know about it unless he happened to see you or your light; isn't that so?

A. But I told him.

Q. Yes, I know you told us that you told him. Now, it isn't your custom there in the Mormon yard to pass signals to switch cars with whistles or bells, is it? A. Occasionally.

Q. You weren't doing it that night, were you? You were passing them with hand signals?

A. Yes, sir.

Q. You weren't using flares either, were you?

A. Not supposed to.

Q. When it gets sufficiently foggy that you can't see the regular switchman's lantern you sometimes use flares, don't you?

A. We do, but we are not supposed to.

Q. And you weren't doing it that night to increase your visibility? A. Yes, sir. [77]

Q. Now, I believe you told us where Mr. Mahan was when you say you walked up to the east end of these two cars. You said Mr. Mahan was right here (indicating) at this point marked the bull switch, right at the switch where the No. 1 track meets the back lead track; is that right?

A. Yes, sir.

(Testimony of Joseph John Seamas.)

Q. Where was Mr. Weith?

A. Mr. Weith at that time, as that was the only light was just easterly—southeasterly of where Mr. Mahan was.

Q. How far southeasterly of Mr. Mahan was the other light? A. I don't know.

Q. Can you give us an estimate?

A. Well, I would give an estimate to my knowledge of working as a foreman, it would be down at the west end of the west three cars that the engine had hold of.

Q. How far would that be from Mr. Mahan?

A. The weather was kind of foggy and to the best of my knowledge—it would be my judgment as past practice it would be around four or five car lengths from the bull switch.

Q. Did you see the other lantern presumably carried by Switchman Weith at the time you were talking or say you were talking to Mr. Mahan?

A. That was a lantern that I had seen.

Q. You think it was four or five car lengths toward the east; is that right? [78]

A. Southeast about four cars—probably four or five.

Q. That would be 250 feet, wouldn't it?

A. I don't know, I didn't measure. That is just rough.

Q. When was it that you could only see 40 feet?

A. Well, the way that tule fog is, sir, you walk a few feet and then I proceeded and it seemed it

(Testimony of Joseph John Seamas.)

was a little clearer, but it is hard to describe on account of that fog; tule fog.

Q. Mr. Seamas, at the time that coupling was made, this last kick move that you say at the time of which you say you fell, Mr. Weith was standing within 50 feet of Mr. Mahan, wasn't he?

A. Would you be kind enough to repeat that again so I can understand it?

Q. Yes, I sure will. At the time you say you fell, Mr. Weith was standing within 50 feet of Mr. Mahan, wasn't he?

A. At the time I fell I don't know where Mr. Weith was.

Q. All right. At the time you spoke to Mr. Mahan just before you went on the north side of the cars and climbed the northwest corner of the westernmost car, wasn't at that time Mr. Weith standing within 50 feet of Mr. Mahan?

A. I just told you just a while ago he was up about the west end of those three cars.

Q. OK. Now, the engine had hold of how many cars just before this last kick move?

A. Repeat that again, please?

Q. How many cars did the engine have hold of before that last [79] kick move was made when you claim you were knocked off the car?

A. It had hold of three.

Q. You think there were about three car lengths between the two cars that were coupled up here and the other cut of cars; isn't that right?

A. I said four or three, whatever it was—or five.

(Testimony of Joseph John Seamas.)

It was the distance of the light to my knowledge.

Q. So that would be a total of either six or seven car lengths that the engineer was from these two cars, wouldn't it?

A. Yes, sir. About that, yes, sir.

Q. And signals were actually being passed by lantern that distance, weren't they, seven car lengths? A. I guess they were.

Q. And the engineer reacted on the signal and moved the cars, didn't he? A. I don't know.

Q. Now, yesterday you told us, Mr. Seamas, that after the kick was made and after you fell, these cars moved three to four hundred feet down No. 9 track. Did you see them move that far, Mr. Seamas?

A. They wound up in that location where those two cars are marked on that No. 9 track.

Q. Did you see them down there after you fell?

A. Yes, sir.

Q. Three or four hundred feet without a light on those cars? [80]

A. I was down there, sir.

Q. You walked down there, did you, sir?

A. Yes, sir.

Q. Right after you got up? A. Yes, sir.

Q. Now, Mr. Seamas, I am going to ask you to search your memory here very carefully. Wasn't it a fact that only one car, not two, was kicked toward No. 9 track?

A. I told you, sir, that one car was going to 9 and then the other one that was going to 6 was tied

(Testimony of Joseph John Seamas.)

on to the car that was going into No. 9. That had stopped and coupled on to the car that was going into No. 9.

Q. OK. And then you did come up to see that the coupling was made. That is your testimony, isn't it? A. It was opposite me.

Q. Now, after your alleged fall, Mr. Seamas, where did the cut of cars come to a stop, after they kicked, as you say, these two cars here?

A. Will you be kind enough to repeat that again?

Q. Yes, sir. After the kick move, after your fall, where did the cut of cars attached to the engine stop?

A. Just opposite me, my left side. Just about the location where them are (indicating), the two west cars there.

Q. Still these cars were between you and the foreman, then; is that right? [81]

A. I guess they were, because he was on the south side of them.

Q. Now, cars stand up above the track at least some distance, don't they? A. Yes, sir.

Q. You can see under them, can't you?

A. No, sir.

Q. You can't see under cars?

A. Not all the way.

Q. Sir? A. Not all the way.

Q. Well, were you down on the ground?

A. I got up right away, as best I could.

(Testimony of Joseph John Seamas.)

Q. Did you have your lantern down on the ground an instant?

A. I didn't stop to look or think. I had it gripped on to my hand.

Q. You told us yesterday you tried to get up right away. Did you get up right away?

A. That is what I just tried to tell you now.

Q. Now, as I understand it, yesterday on direct examination you told us, Mr. Seamas, that you didn't work after the accident, that you stayed on the job but you didn't actually do any work. Then, on cross-examination you recalled that you did climb one car and set a hand brake. Now, you will recall that I took your deposition in Stockton in your attorney's office [82] on September 7, 1951, before a notary public, and you were sworn to tell the truth, the same as you are here. Do you recall that? A. Yes, sir, I do.

Q. May I approach the witness, your Honor?

The Court: Yes.

Q. You recall then that I asked you this question:

"Q. Did Mr. Weith ask you what happened?"——

Mr. Papas: Excuse me, Mr. Cummins. Would you mind giving us the page, please?

Mr. Cummins: I am sorry; it is page 25, and it is line 26.

Mr. Papas: Thank you.

Mr. Cummins (Reading):

"A. No."

(Testimony of Joseph John Seamas.)

And I asked you:

"You just told him?"

And you answered:

"Yes."

And I asked you:

"What did he say?"

You answered:

" 'Gee, are you sore?' I says, 'Pretty sore,' or"——

And then I asked you the question:

"Anything else?" [83]

You answered:

"Then we went about to finish our work.

"Q. How long did you work after the accident? A. Oh, about 30 minutes.

"Q. That finished the job, did it?

"A. Yes, sir."

You remember those questions and answers, don't you?

A. Will you repeat them again slow, so I can get ahold of it?

Q. Would you prefer to read them, sir?

A. No, you can read them, sir.

Q. All right, this is the portion in which I am interested, about which I mean to ask you further. I asked you:

"Q. How long did you work"——

(Testimony of Joseph John Seamas.)

No. First question:

"Q. Anything else?

"A. Then we went about to finish our work.

"Q. How long did you work after the accident? A. Oh, about 30 minutes.

"Q. That finished the job, did it?

"A. Yes, sir."

You remember that I asked you those questions and you gave those answers, don't you, sir?

A. Yes, sir.

Q. Now, you didn't tell me at the time of the taking of the deposition—of this deposition, that you stood idly by, did you? [84]

A. I stood idly by while we went to take that car over the traction. I didn't throw any switches.

Q. Did you finish the work, help finish the work?

A. I rode that car down into the traction.

Q. Now, Mr. Seamas, did it take you 30 to 40 minutes to ride that one car down the track and tie the brake?

A. I don't know the time it took, sir.

Q. You know it didn't take you that long to ride one car down one track and tie a brake on it, don't you? A. At times it takes longer.

Q. Did you do any other work that you haven't told us about after this alleged accident took place?

A. None at all.

Q. Now, did you actually get up on top of the brake platform, Mr. Seamans?

(Testimony of Joseph John Seamas.)

A. Which one do you mean, sir?

Q. Just before you say you were knocked off?

A. I had this right foot to get on it and I was knocked off. That is the best I can recall.

Q. You had your right foot on the brake platform but not your left foot? A. No, sir.

Q. Where was your left foot?

A. On the ladder.

Q. On the end ladder or on the side ladder? [85]

A. On the end ladder, sir.

Q. You mean that you are able to put one foot on the brake platform which is on the end of the car while you have your left foot on the side ladder clear around the corner?

A. May I explain it to you, sir?

Q. You may, sir. I have asked you the question.

A. I had gotten around to the end which the ladder comes on a square like a boxcar is and the ladders—you got to cross around. I was on the end getting ready to put this foot or leg on the brake platform and the impact knocked me off.

Q. Well, then you had your left foot on the end ladder, didn't you?

A. I had both feet on the end ladder and getting ready to put my right foot on the west end of the car as the brake platform is next to the ladder.

Q. All right. Now, that clarifies it just a little bit. You were on the end ladder instead of the side ladder?

A. I went up on the side ladder, sir, crossed over to the end ladder—like the end of this desk

(Testimony of Joseph John Seamas.)

right here (indicating). I crossed over to the second grabiron from the top, crossed over here (indicating). They got a grabiron that runs like that for us fellows to hang on—got on the end right alongside the second grabiron from the top of the ladder. There is a brake platform that we step on to operate the brake. [86]

Q. All right. Now, so that it is clear, just before the impact you were on the end of the car, on the ladder ready to place, or placing your right foot on the brake platform, is that correct?

A. To the best of my knowledge, yes.

Q. And your left foot was on the end ladder?

A. My left foot was on the end ladder.

Q. You will remember that the company asked you to fill out a form No. 1421, standard report of injured persons. You are familiar with those forms, aren't you? A. Yes.

Q. This is your signature at the bottom of the page, isn't it, Mr. Seamas? A. Yes.

Q. You filled that out on about the date it bears, December 18, 1950, did you, sir, or did you dictate it to someone—someone wrote it for you?

A. Sometime that time.

Q. Your memory was at least as clear then as to how this alleged accident happened as it is now, was it not? A. To the best of my memory.

Q. I notice you were saying here in answer to the second question: "State what, in your judgment, was the cause of your injury, and what you were doing at the time it occurred?" You answered

(Testimony of Joseph John Seamas.)

this way: "I was standing on the brake [87] platform, releasing a brake on a cut of two cars, the other two members of the crew attempted to couple into the two cars and ran against them with such force that I was knocked off of the platform, to the ground."

Now, Mr. Seamas, could you tell us now with that refreshment of your memory, if you were standing on top of the brake platform to release the brake at the time of the impact?

A. I know to the best refreshment of my memory, sir, I was going to release the brake when I had a chance to, but I——

Q. Well, does this refresh your memory, that you actually had arrived at the brake platform and were up on top of it——

Mr. Papas: Excuse me, Mr. Seamas. Your Honor, may we agree—may we read this whole statement that is in there so that that will clarify the point? Might we read the whole thing?

Mr. Cummins: Your Honor, the remainder of the statement is not material to this point. I would like to proceed in my own way.

The Court: You may proceed in your own way, and you may ask him about it later.

A. I had one foot, the best that I can remember, sir, on the brake platform. Either I had it on or getting on it. My intentions were to get on the plat—my——

Q. Now, Mr. *Mahan*, if you were up on top of the brake platform with your lantern in your right

(Testimony of Joseph John Seamas.)

hand as you told us you were holding the lantern that light would be above the level of [88] the boxcar, wouldn't it? A. No, sir.

Q. How far from the top of the car is the brake platform, Mr. Seamas?

A. Well, for the best of my knowledge, between two and three feet down from the top of the car.

Q. Where is the brake staff or the brake wheel that you used to unloosen the brake?

A. It is just a tri—bit below the roof of the boxcar.

Q. When you are standing on top of the brake platform how high is your head above the top of the car? A. I don't remember, sir.

Q. You are about five feet eleven, aren't you?

A. Yes, sir.

Q. Let's say that the brake platform is 2½ feet below the top of the car. Your head would then be the difference between 2½ feet and 5 feet 11 inches, wouldn't it?

A. Repeat that again, please, slow, so I could understand it. I am sorry.

Q. Never mind, I will withdraw it. Now, Mr. Seamas, when the cut of cars hit the car on which you were was that something of a jolt?

A. Severe impact, sir.

Q. The cars then moved in a general westerly direction with the impact, didn't they? [89]

A. I guess they did.

Q. The cars did move in a generally westerly direction with the impact, didn't they?

(Testimony of Joseph John Seamas.)

A. I guess they did.

Q. And the impact was in such a way that you were knocked towards the east, weren't you?

A. Toward the northwest, sir.

Q. You were knocked northwest?

A. Yes, towards the west.

Q. You were knocked towards the west, is that correct?

A. West or northwest. It happened, I didn't stop to look or find out. I was——

Q. In any event, you were not run over, were you? A. I thought I was.

Q. Were you?

A. Well, I didn't stop to look.

Q. Did you have any marks on your body after this alleged accident took place?

A. Yes, I did.

Q. What marks did you have?

A. A gash on my left knee where I had landed, and a bruise on my right knee, and my hands were burning like you would rub your hands against a pavement.

Q. Have you told anyone, any of your fellow employees, you fell off the side ladder? [90]

A. I told them I got knocked off.

Q. Did you tell any of them you got knocked off the side ladder?

A. I told them I got knocked off.

Q. Did you tell any of them you got knocked off the side ladder, Mr. Seamas?

A. To my knowledge, I don't know.

(Testimony of Joseph John Seamas.)

Q. You don't know whether you did or not?

A. I don't know.

Q. You may have told someone that you did get knocked off the side ladder?

A. I told them I got knocked off.

Q. You don't know whether, at this time, you did tell someone of your fellow employees it was the side ladder you got knocked off of?

A. I told them that I got off about the brake platform or on the brake platform, I don't recall.

Q. Could you see any lanterns of either Mr. Mahan or the pin puller, Mr. Weith, when you were on the side of the car and were up on top of the brake platform? A. No, sir.

Q. You didn't see any lanterns?

A. No, sir.

Q. Now, Mr. Seamas, on every freight car there is an "A" end and also a "B" end, isn't that [91] right? A. Yes, sir.

Q. The "B" end is the brake end, where the brake is, isn't it? A. Yes, sir.

Q. In this instance the "B" end or brake end, was on the west side or westernmost one that you climb up on, is that right? A. Yes, sir.

Q. And there are four ladders on that car and four separate ways of getting up on it to the brake platform, aren't there? A. Yes, sir.

Q. There is one on the end—west end of the car, on the north side of the car? A. Northwest.

Q. Both of which are on the northwest corner. That is two of the ladders, isn't it?

(Testimony of Joseph John Seamas.)

A. Yes, sir.

Q. Now, similarly, there are two ladders on the southeast corner, on the side of the car and one on the end of the car, is that not correct?

A. Yes, sir.

Q. If you are working on the side where the signals are being passed, in order to get to the brake end of the car, placed as this one was placed, you could climb up either ladders at the southeast end to get on top of the car and walk on the top of the car on the catwalk to the brake platform, couldn't you? [92]

A. Then you would have to step down to——

Q. That is right?

A. ——two grabirons below, causing it more difficult.

Q. Just a minute, Mr. Seamas. I asked you, Mr. Seamas, if you could get to the brake platform by that route?

A. By stepping down to the platform.

Q. At all times you would be within view of anyone on the ground where they could pass signals to the engine if you went that route, wouldn't you?

A. Yes, sir.

Q. Mr. Seamas, after you quit work the day that you say you fell off the car, or were knocked off the car, you went to the register room, didn't you, with the other crew members?

A. I went to the register room, sir.

Q. So that the jury will understand a little better what the register room is, the law requires you

(Testimony of Joseph John Seamas.)

to go there and sign that you are to work, isn't that right? A. Yes.

Q. You signed the law sheet? A. Yes, sir.

Q. And all the crew members are required to do that, aren't they? A. Yes, sir.

Q. Now, on the evening in question you finished your work before the usual quitting time, and Mr. Ellis, held you and the other employees, other members of the crew, for 25 or [93] 30 minutes before he would release you from duty, isn't that right? Do you remember that?

A. Mr. Ellis told me to make—I asked him—it was around 20 or 25 minutes, the way you said, before our time was up—that we were all through, that that was it for the day, and by the time that I signed the register sheet, by that time I signed the register sheet.

Q. How long did you stay there?

A. I don't remember. I just signed the register sheet and went down to the locker room.

Q. Mr. Ellis was the yardmaster that night, wasn't he? A. Yes, sir.

Q. He is the man that makes reports of injuries if any occur, and to whom to report an injury if one occurs, isn't he? A. Yes, sir.

Q. Did you tell Mr. Ellis you were injured?

A. As soon as I got home.

Q. Mr. Seamas, you talked to Mr. Ellis that night, didn't you?

A. I just asked him, "Mr. Ellis—Jim, is that it?" He pulled his watch out and said, "Be-

(Testimony of Joseph John Seamas.)

snickered like a bunch of school kids. They thought I was kidding. I said, "No, look at my knee." They seen my knee with their own truthful eyes where it was gashed, and my left knee was bruised. Said—somebody said, "Do you want to make a report?" I said, "Oh, this isn't nothing."

You know, avoid a lot of unnecessary writing, we do take a few stumbles like we do on any kind of a job. I don't like to make unnecessary reports. I told them, "If I don't show up in the morning, or I don't feel a bit better I will call the yardmaster."

Q. Mr. Seamas, did you tell Mr. Marrs, and the other members of the engine and train crew that your back hurt? A. Yes, sir.

Q. Right at the switchmen's locker room?

A. I told him my back was sore and my legs was sore.

Q. Were they hurting you very much?

A. They were.

Q. You told all of them that your back hurt, that is right, is it? A. Yes, sir.

Q. Mr. Seamas, you know Tug Wilson, don't you? [97] A. Yes, sir.

Q. Trainmaster, isn't he? A. Yes, sir.

Q. You know James Anderson, claims adjuster, too, don't you? A. Yes.

Q. Both of them were on the platform with a pass on the Golden Gate for you to go to the Los Angeles hospital at one time, weren't they?

A. No, sir.

(Testimony of Joseph John Seamas.)

Q. Did you see Mr. Tug Wilson sitting right there in the back of the court room?

A. Yes, sir; I face him, sir.

Q. Do you see Mr. Anderson sitting here in the back of the court room, too? A. I do, sir.

Q. Did you meet them at a station platform in Stockton after this injury occurred, or after this alleged injury occurred? A. I did, sir.

Q. They were there on the station platform?

A. No, sir.

Q. You didn't meet them there?

A. I met them inside of the door of the station.

Q. Mr. Peterson was with you, is that right?

A. No, sir. [98]

Q. At least the three of you were there, weren't you? A. No, sir.

Q. Who was there?

A. My neighbor, Mr. Patterson.

Q. And Mr. Anderson and Mr. Wilson?

A. Yes, sir, and myself.

Q. You were there at train time to get on the Golden Gate, were you? A. Yes.

Q. That is the streamline train, isn't it?

A. Yes.

Q. At that time Mr. Anderson told you, didn't he—asked you whether you wanted to stay in Stockton or go to Los Angeles to the hospital?

A. Yes, sir.

Q. And he told you you could have the doctor of your choice, didn't he? A. Yes.

(Testimony of Joseph John Seamas.)

Q. And you said you would continue with Dr. Lucky, didn't you? A. No, sir.

Q. Did you make a choice?

A. By their request.

Q. What did Mr. Anderson say to you?

A. It was so complicated, sir, that I wanted to go get relief.

Q. What did Mr. Anderson say to you, Mr. [99] Seamas?

A. I don't recall, but I have got a witness that was there that heard the conversation, sir.

Q. Didn't Mr. Anderson tell you the Santa Fe would pay the bills of any doctor of your choice to take care of you?

A. It has been so long, I don't know, sir. I was in misery. My partner may be able to answer that, that question, sir.

Q. Now, Mr. Seamas, your counsel asked you yesterday whether or not Dr. Lucky took any X-rays of you and if he examined you at all or just kind of hit or miss. Did he examine you?

A. Once or twice.

Q. Did he give you a several minutes examination? A. Several minutes.

Q. Have you take your clothes off?

A. Half way.

Q. Down to your waist?

A. About to my waist, yes.

Q. You had X-rays taken two days after this—after December 9, 1950, didn't you?

A. Two or three days, I am not sure. It is on the records, two or three days.

(Testimony of Joseph John Seamas.)

Q. And those X-rays were turned over to Dr. Lucky with your knowledge and consent, weren't they, and he has them now? A. Yes.

Mr. Cummins: I will be through in a moment, your Honor.

Q. Haven't you had some income since this accident happened? [100] A. No, sir.

Q. You haven't received any money at all?

A. Other than my insurance, the Continental Casualty, and the Railroad Retirement and my back pay that was awarded to us some time from the time I was working, the time of the National Agreement settlement; and the vacation that I earned last year, I received that the first of May, which was the amount of about $150.00.

Q. All right, sir. Well, Mr. Seamas, you told us that the change in the weather caused your upper back to hurt you. Did you mean to say your upper back hurt you, too?

A. It is hard to explain. Throughout the upper section of my back and the lower portion.

Q. How often does the upper portion of your back hurt you?

A. It is hard to explain, sir. It depends how I sit or how I twist.

Q. Does it hurt you every week?

A. Repeat that, please?

Q. Does the upper portion of your back hurt you every week? A. No, sir.

Q. Every month or every day? Tell us about it, if you will, please, sir?

(Testimony of Joseph John Seamas.)

A. I can't explain it. It is a pain that I can't explain. [101]

Q. Is it the same kind of pain that you have in your lower back? A. Very similar.

Q. And you have had that ever since this accident took place?

A. In the lower portion of my back, yes, sir.

Q. The upper portion of your back, too?

A. Yes, sir.

Q. Mr. Seamas, in 1939, you were wedged between a car and a stanchion, weren't you?

A. Yes, sir.

Q. You lost approximately four months lost time on that occasion, didn't you, from your work?

A. September, October, November, December—about four months.

Q. The small of your back was involved? The lower part of your back was involved in that injury, wasn't it? A. I don't remember.

Q. You had an operation on your back on that occasion, too, didn't you?

A. Not an operation, sir.

Q. Didn't you have a hematoma lanced and a tube inserted and drained right in the small of your back? Don't you remember that?

A. I don't know, sir. I don't know what you call it.

Q. I used a technical term which you wouldn't have any reason [102] for knowing, and I apologize. Didn't you have an operation, in 1939, to the small of your back?

(Testimony of Joseph John Seamas.)

A. I know they took some blood out of one of the veins right in my hip here and I recovered from that.

Q. The small or lower part of your back hurt you, didn't it, in 1939?

A. It was toward the upper part right up below my shoulders.

Q. Right below your shoulders on that occasion?

A. Similar to that, sir.

Mr. Cummins: Your Honor, rather than take time to look at the records, may we have the morning recess at this time?

The Court: We will take the morning recess, ladies and gentlemen. Same admonition to you, ladies and gentlemen of the jury, not to discuss the case under any conditions.

(Whereupon, a short recess was taken.)

Mr. Cummins (Continuing): Mr. Seamas, you recall being in the Santa Fe Coast Lines Hospital, your employees' association hospital in Los Angeles in 1939, following your back injury, don't you, sir?

A. Yes.

Q. You recall at that time you had a large bruise right at the lower part of your back, don't you?

A. On the upper part of my back; just below my shoulders, sir.

Q. Below your shoulders. At that time X-rays were taken of [103] your lower back, weren't they?

A. I don't know. They took X-rays, sir.

(Testimony of Joseph John Seamas.)

Q. How long were you in the hospital in 1939, Mr. Seamas?

A. From—the best I can remember was from August 28th—it was either the latter part of September, and it could have been the first part of October. I won't swear.

Q. May I ask you sir, this, is it your testimony here now that in 1939 you didn't hurt the lower part of your back?

A. It has been so long I don't remember, sir.

Q. You don't remember?

A. I don't remember.

Mr. Cummins: That is all.

The Court: You may examine the witness.

Redirect Examination

By Mr. Michael:

Your Honor, there has been some confusion as to the "A" and "B" end of the car and the ladder so we have brought in with us this morning a small replica of a boxcar with the "A" and "B" ends just for purposes of clarification. I would like to show this to the witness and allow him to explain.

The Court: You may use it for that purpose. Does that have a hand brake on it or any similar brake?

Mr. Michael: Yes, your Honor.

The Court: By the way, what type of brake was this, Mr. Seamas? [104]

(Testimony of Joseph John Seamas.)

The Witness: An Ajax.

The Court: Is that a hand-manipulated brake?

The Witness: By a wheel, yes, sir.

The Court: Where is the wheel, on the side of the car or on the upper?

The Witness: On the west end of the car, on the west end brake. It has got gears inside that pulls up by the turn of that wheel.

The Court: These jurors have never seen a boxcar. You tell them about it. Maybe they are not familiar with it.

The Witness: When we speak of Ajax brakes—maybe that one is similar.

Q. (By Mr. Michael): Mr. Seamas, I am going to show you a boxcar and ask you if this is similar to the type of boxcar that you climbed on, and calling your attention to the ladders on the side of the boxcar and the brake on the end of the boxcar and this end of the boxcar (indicating).

Now, first we spoke of an "A" and "B" end of a boxcar. Which is the "B" end of a boxcar, Mr. Seamas?

A. The "B" end of the boxcar is the end that the brake is on.

Q. The end that the brake is on? A. Yes.

Q. And this is the "A" end (indicating), is that correct? A. Yes, sir. [105]

Q. If you will note here there is a little black wheel which I imagine is supposed to be the brake on this model. Is that in the same substantial posi-

(Testimony of Joseph John Seamas.)

tion that the brake was on in the car which you were knocked off of?

A. Can I get closer and take a good look at it? (Witness examines model.) Very similar.

Q. In other words, the wheel which operates the brake was on the end of the boxcar?

A. On the end of the boxcar just in that location.

Q. Now, this car in relation to this diagram would be—if this were the "B" end would be in about this position (indicating), isn't that correct?

A. Yes, sir.

Q. And when you walked around you walked around this side, is that correct? A. Yes, sir.

Q. Now, will you explain to the ladies and gentlemen of the jury—and you hold this in your hand when you are explaining—just how you climbed on that boxcar and what you did when you were going to attempt to release this brake? Just hold it up so the ladies and gentlemen of the jury can see it.

A. I came down the north side of both cars and about the ladder here which is small. You can see a little stirrup right in the bottom. I went up, crossed over, hanging on to this little grabiron that we call the top grabiron for a jar when you are traveling to hang on so you won't get jerked off, crossed [106] over and here is what I was trying to explain. The second grabiron right here from the top—not this one, but this one and this one (indicating) as it is just about even or just a little below the second grabiron from the top, and I had hold

(Testimony of Joseph John Seamas.)

of it, foot on the brake platform to check and see if the ratchet was tight, loose, which I never had a chance to do. The impact hit like that (indicating) and I don't know whether I went down or forward, but the cars went on into No. 9. That is the best I can explain it to you.

Q. Now, Mr. Seamas, as you were reaching for this brake do you remember just prior to the time you were knocked off, where was your right foot, on which ladder, the side ladder here or the back ladder, do you recall?

A. My left foot was on the end ladder.

Q. That would be this ladder here (indicating)?

A. Yes, sir.

Q. And where was your right foot?

A. Either on the brake platform or getting on the brake platform. It happened so long ago I don't remember, but if I put it on the statement 1428 it could have been that I was on the brake platform to check the brake and never had a chance to even put the light on.

Q. How large is this brake platform on the "B" end of the boxcar?

A. Enough to hold your body. [107]

Q. How wide, approximately?

A. Oh, I don't know, to tell you the truth. I wouldn't want to say. I know it holds—I have got a big foot, and it holds my foot good.

Q. How wide is it, would you say, from this point to this point (indicating)?

A. May I see this?

(Testimony of Joseph John Seamas.)

Q. No, on the car that you were knocked off of?

A. It is either three or four feet across with a little groove in the center of it to allow—some of those Ajax have a steel rod hooked on. On top of the steel rod it has a chain that winds in the gear like a jackscrew. That is what it is, a jackscrew. It is an Ajax brake, but it is a jackscrew, if anybody ever seen a jackscrew. When that big wheel turns it makes it easy to turn on account of these various little jaws in here that pull, and that pulls right on up and brings the brake shoes together.

Q. You say this is about three feet across here, Mr. Seamas (indicating)?

A. Three or four feet. I never measured it.

Q. Just approximately. Then how deep is this platform? How much does it stick out from the end of the car, just roughly in your own estimation? We know you haven't measured.

A. About—around 18 inches—16 or 18 inches, something similar to that. It is two pieces of plank about that wide [108] (indicating) bolted on to the steel brace that comes out and grooves down.

Q. Now, Mr. Seamas, you stated that you walked along the north side of the boxcar and climbed up the north ladder, is that correct?

A. Northwest ladder of the car.

Q. Now, to have reached that brake by going along the south side of the boxcar and—giving you the boxcar again, will you explain to the ladies and gentlemen of the jury how you would reach this

(Testimony of Joseph John Seamas.)

hand brake if you were to walk along the south side of the tracks? A. My past experience——

Q. Just explain the route that you would have to take on the boxcar, Mr. Seamas.

A. The route would either come down on the south side, cross over from the north side of the other car and walk down, go up this ladder, get on top of this conductor—what they call a conductor here—the walking conductor, walk on over then get down and climb on down to the brake platform, over and on down.

Q. Is there anything along this top to support you while you are walking? A. Yes, sir.

Q. What is there, a rail, or something along the top? A. No, sir, there isn't.

Q. There is no rail or anything to hang on [109] to? A. It is just as plain as it is there.

Q. Just this plain board running across the top of the car? A. Yes, sir.

Q. Now, Mr. Seamas, when you were knocked off of this car here, these cars continued down, is that correct, along the back lead here?

A. No, into No. 9 where those two are chalked.

Q. Excuse me—back down the back lead into No. 9. And the track curves at this point, isn't that correct? A. Slight curve, yes, sir.

Q. Now, you stated that you went into the register room to make an accident report, is that correct, after this accident took place, or the day after?

A. No, sir.

Mr. Cummins: Just a moment. Object to the

(Testimony of Joseph John Seamas.)

question as leading and suggestive and also not supported by the record. I don't think the witness made any such statement.

Mr. Michael: I am sorry, your Honor. I thought he testified on cross-examination that he went into the register room.

The Court: He did state that he went into the register room. Well, ask him what happened there, if you wish.

Q. (By Mr. Michael): What happened in the register room, Mr. Seamas?

A. Well, after we come down we rode down on the engine and went in the register room. Mr. Ellis was over on the other [110] side in the yardmaster's office and I was on this side. I waited until he got off the phone, he was talking, "Oh, Jim, is that it?" He looked at his watch, he looked up, "Well, kid," he says, "You might just as well go. Youse guys can't do anything else." I turned over to the right—pardon, before I turned to the right, I said, "It's sure swell." I didn't feel so hot,—just something, kind of a converse. I went over and registered off, then I went down to the locker room.

Q. Now, Mr. Seamas, you stated that you were injured in 1939, twelve years ago, is that correct?

A. Yes, sir.

Q. And after you were given this treatment and placed in the hospital, and after you had recuperated did you receive a physical examination?

A. I received an examination to resume full duties from the hospital association.

(Testimony of Joseph John Seamas.)

Q. And you were then released to go back to work? A. Yes, sir.

Q. I see.

Mr. Michael: I have no other questions.

Recross-Examination

By Mr. Cummins:

Q. One very short question. Can you tell us please, Mr. Seamas, whether or not the car from which you were knocked off was damaged in any respect whatever? [113]

A. I don't know. I don't know, sir.

Mr. Cummins: That is all.

Mr. Michael: Does the Court have any questions, your Honor?

The Court: One question or two. What is the approximate distance, according to your recollection, as to the fall? How many feet would you estimate from the position where you were before the impact and after? How high did you fall from, eight feet, ten feet?

The Witness: It was either ten or twelve feet, Judge.

The Court: How did you land on the ground, if you have any recollection of that?

The Witness: I still think I landed like that (indicating), just in the position I am now.

The Court: With your hands out?

The Witness: My hands like that (indicating) and my knees just—whether it was between the two

(Testimony of Joseph John Seamas.)

ties, or whether I hit the edge of the ties I don't recall. When I landed I had my hands and knees down.

The Court: And after you hit the ground the car continued on, did it?

The Witness: Which ones, Judge?

The Court: The car you were on. Did that continue on?

The Witness: That continued on when I was knocked off, yes, sir. [114]

The Court: You had not lost any time before this accident, had you?

The Witness: Once in a while I would lay off to give—we got an extra board.

The Court: No, I mean on sick leave.

The Witness: No, sir, unless the flu or a cold.

The Court: Ordinary routine cold, or things like that?

The Witness: That is all.

The Court: And since 1939, the date of this last accident, did you lose any time on account of injuries or anything of that character?

The Witness: In about 1947.

The Court: What was that injury?

The Witness: That is when the switch stand—the handle flew off and hit me on the side.

The Court: Yes, you referred to that accident?

The Witness: Yes.

The Court: And you have worked continuously, have you, save and except for those occurrences?

The Witness: Yes, sir.

(Testimony of Joseph John Seamas.)

The Court: And since this accident you have not returned to work, have you?

The Witness: No, sir.

The Court: All right, I have no further questions.

Mr. Cummins: Pardon me just a moment, your Honor. [115]

Recross-Examination

By Mr. Cummins:

Q. Mr. Seamas, in 1947, you were off work for a considerable period of time that was not related to any injury, and you were in the Santa Fe Hospital, you were in the Georgia Street Receiving Hospital, Los Angeles, weren't you?

A. That wasn't no injury, sir.

Q. That is right, but you were in the hospital, weren't you? A. I was ill.

Mr. Cummins: That is all.

The Witness: Can I explain that, sir?

The Court: Yes, you can explain that.

The Witness: During the war, folks, we were so short of men. I am an ex-Marine reserve, wanted to help, do my part. Worked 16 hours a day from 11:00 p.m. until 3:00 o'clock in the afternoon.

Mr. Cummins: Pardon me, Mr. Seamas. Your Honor, I think counsel can argue Mr. Seamas' case for him, but this is the nature of argument.

The Court: It probably is.

Mr. Cummins: And sympathy.

(Testimony of Joseph John Seamas.)

The Court: Did this relate to your hospitalization?

The Witness: Yes, sir.

The Court: All right, then will you go right to the matter [116] of hospitalization? Why were you there, sir?

The Witness: It hit me in 1947. I felt myself breaking down. I didn't want to break down. In the meantime I had domestic troubles. I didn't drink, I didn't go raise the dickens. I have got a child to think of. I got my legitimate rest——

Mr. Cummins: Your Honor, I think this is beyond the scope of reasonable testimony.

The Court: I agree with counsel. These matters naturally arouse sympathy, but at the same time they do not relate directly, Mr. Seamas, to the matters in question. Accordingly, the jury is instructed to disregard the statements of domestic matters and the like. You may step down. Call the next witness, counsel.

(Witness excused.) [117]

SIDNEY ALBERT WEITH

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

The Witness: Sidney Albert Weith, 1026 West Cornell, Fresno, California.

(Testimony of Sidney Albert Weith.)

Direct Examination

By Mr. Michael:

Q. Mr. Weith, I will have to ask you to be a little slower because she has to take this down on the machine. Mr. Weith, what is your age at the present time? A. Twenty-three.

Q. What is your occupation?

A. I am a student.

Q. And in what school are you attending?

A. Fresno State College.

Q. By whom were you employed, Mr. Weith, on December 9, 1950? A. Santa Fe Railway.

Q. When did you first go to work for the Santa Fe Railway?

A. About November, middle of November.

Q. Of what year, Mr. Weith?

A. '50—'49.

Q. November, 1950? A. Yes.

Q. How long did you work for the Santa Fe Railroad? [118]

A. Approximately three months.

Q. And have you ever worked for any other railroad, Mr. Weith? A. No.

Q. What was your job with the Santa Fe?

A. I was a switchman.

Q. What did you do? What duties did you perform as a switchman?

A. I was what is known as a pin puller. When the cars are to be uncoupled my job is to pull the lever and—which by means of leverage pulls the pin from the coupling and uncouples the cars.

(Testimony of Sidney Albert Weith.)

Q. And in what yard were you working on December 9th of 1950?

A. Mormon Yards, Stockton.

Q. With whom were you working on that day?

A. Mr. Seamas, Mr. Mahan, and the engineer and fireman, Mr. Strain and Mr. Marrs.

Q. What hours did you work that day?

A. Three p.m. to 11:00 p.m.

Q. Now, calling your attention to the hour of 10:00 or 10:15 p.m., on that day, do you recall whether an accident occurred at the Mormon Yard?

A. Yes.

Q. And how did you know that this accident took place?

A. Mr. Seamas had made comments. [119]

Mr. Cummins: Sorry, I didn't hear that answer, your Honor.

Q. (By Mr. Michael): How did you know that this accident took place?

A. Mr. Seamas told me of that accident.

Q. Is that the only way that you knew that this accident took place? A. Yes.

Q. Now, what was the condition of the weather at that time?

A. It was night, and very foggy. It was spotty fog.

Q. There has been some confusion here as to how far a person can see. Perhaps you can clarify that by explaining a little about tule fog, would you please?

(Testimony of Sidney Albert Weith.)

A. Well, you can be standing in one position——

Mr. Cummins: Objection, unless the question is restricted to the night in question.

Mr. Michael: On December 9th, Mr. Weith.

A. On December 9th it was, well, what has been referred to as a tule fog, which is spotty. At one position you can see some distance, and a few feet away you can't see very far at all. It is a fog that covers to the ground and when you are in it you know it. You can't see very far at all.

Q. Now, just before this accident had happened will you explain what train movements were made by the crew?

A. Well, we took the five cars from the rip track and pulled [120] them back to the lead track for switching to their respective positions in the field.

Q. Then what happened?

A. One car had been kicked down to go to No. 9, and came to rest at the, just beyond what is outlined there as the bull switch.

Q. Is that the only car that was kicked that night, Mr. Weith?

A. No, the next one was to go down to the track at the field, and it couldn't be kicked in there because the one car had followed the lead.

Q. Where did the second car come to rest?

A. I guess it was just going down the line.

Q. At this time who was the engineer?

A. Mr. Strain.

Q. Mr. Strain? A. Yes.

(Testimony of Sidney Albert Weith.)

Q. And where was his position?

A. He was in the engine.

Q. Where was the fireman?

A. He was also in the engine.

Q. Who was acting as engineer at this time?

A. The regular engineer, Mr. Strain.

Q. And what side of the train would he be sitting on, or which side of the engine, excuse me?

A. He would be sitting on the north side of the engine. [121]

Q. That would be the fireman or the engineer sitting on the north side?

A. That would be the engineer that would be sitting on that side.

Q. Where would be the fireman who was operating as the engineer sitting?

A. On the south side, across from him.

Q. On the south side? A. Yes.

Q. Where was the foreman, Mr. Mahan, standing at the time that these two cars had been kicked down?

A. In the general area of the bull switch.

Q. Will you kindly step to this board and indicate on the board the position Mr. Mahan was standing in? Just indicate it with an "M" in colored chalk.

(Witness goes to blackboard.)

Q. Where were you standing, Mr. Weith?

A. Back in here (indicating on blackboard), in the area of the cars here.

(Testimony of Sidney Albert Weith.)

Q. Did you have any one fixed position?

A. No. I had to walk up and down the cars.

Q. And could you indicate a "W" just approximately where you would be standing, the general area. A. (Drawing on blackboard.)

Q. Are there any other structures in that general area, building or structures of any kind? [122]

A. There was a shanty right about in here (indicating).

Q. Would you mind drawing that in, please?

A. (Drawing on blackboard.)

Q. Is that just south of this bull switch?

A. In there (indicating).

Q. O.K. As you have it diagrammed there, Mr. Mahan would be standing west of you, is that correct? A. That is right.

Q. And did he have a lantern in his hand at that time? A. Yes.

Q. Could you see him carrying this lantern?

A. Yes.

Q. Was there anyone standing between you and Mr. Mahan? A. No.

Q. Did you have a lantern in your hand at that time? A. Yes.

Q. Was anyone standing beyond Mr. Mahan, that is, to the west—well, it would be southwest of Mr. Mahan, that you saw?

A. No, sir, not that I could see.

Q. Mr. Weith, where was Mr. Seamas working at this time?

(Testimony of Sidney Albert Weith.)

Mr. Cummins: At what time? I think that question should be more definite, your Honor.

Mr. Michael: We are speaking just at the time when the two cars had been kicked and the two cars had come to rest?

A. He was working in the general area of the field and along [123] the switches across the track.

Q. (By Mr. Michael): You stated the first car, marked No. 1, had been kicked back, and then the second car—— A. That is right.

Q. ——had been kicked and the two cars had coupled on together. Was the train backed up after that? A. Well, it moved. It backed up.

Q. Do you know who gave the signal to the engineer to back that train up? A. No, sir.

Q. Did you give the signal, Mr. Weith?

A. No.

Q. After the train backed up where was your position, Mr. Weith?

A. In the position that I have on the diagram there.

Q. Were you standing still?

A. Yes. Walking up and down the track there. The diagram is the tail track there.

Q. Do you recall after the train was backed up this tail track, where your position was where you were walking, in what direction?

A. I would be walking west.

Q. As this train approached these two cars which were stopped, was any signal given to slow the train down?

(Testimony of Sidney Albert Weith.)

A. Not to my knowledge. [124]

Q. You didn't see any signal?

A. I didn't see any.

Q. What happened after the train was backed up?

A. Well, it hit into the two cars that were by the bull switch.

Q. And what happened to the two cars?

A. Well, they went on down the track a little ways.

Q. Do you know where they rolled to?

A. Well, the switch was originally lined to go into 9, and they went on down the track.

Q. Do you know in what position they came to rest? A. I don't know exactly where, no.

Q. Was any signal given to the engineer to stop the train before it struck these two cars?

A. To my knowledge, no.

Q. After Mr. Seamas was injured, Mr. Weith, did you hear any conversation take place between Mr. Mahan and Mr. Seamas?

A. Oh, just a word or two shouted back and forth, but what was said I don't know.

Q. Do you recall what the nature of that conversation was? A. No, sir.

Q. You don't know——

The Court: Speak just a little louder. I can't hear you and I am sure the jurors can't hear you. Speak up a little louder, please. This is important to both sides. There is nothing to be concerned about. Just speak up a little louder. [125]

(Testimony of Sidney Albert Weith.)

Q. (By Mr. Michael): I said, did you hear what the gist of the conversation was, Mr. Weith, what they were talking about? A. No.

Q. Did you see Mr. Seamas after work?

A. Yes.

Q. Where did you see him? What was the occasion of your seeing him?

A. I rode home with him. I rode into Stockton with him.

Q. What was his physical condition at that time? A. Well, he was feeling pretty bad.

Mr. Michael: That is all. No further questions, your Honor.

Cross-Examination

By Mr. Cummins:

Q. Mr. Weith, this is the first time I have ever spoken to you, isn't it? A. Yes.

Q. We haven't met before, have we, sir?

A. No.

Q. Mr. Anderson has, however, asked you to come in and see me yesterday, didn't he?

A. Yes.

Q. Gave you a pass, gave you some money to pay your expenses, didn't he? A. Yes, sir.

Q. Where did you go? [126]

A. I went at the hotel, sir.

Q. Did you come over to Mr. Baraty's office?

A. No, sir.

Q. Did you go over to see Mr. Michael and Mr. Papas? A. They were in the same hotel.

(Testimony of Sidney Albert Weith.)

Q. Did you see them? A. Yes.

Q. Did you discuss this accident with them? A. Yes.

Q. Did Mr. Seamas tell you there were two cars here instead of one? A. No.

Q. It was just one car there, wasn't it, that was kicked into No. 9 track? A. Yes.

Q. Just one wasn't it? A. Yes.

Q. There weren't two cars were there, Mr. Weith? That is clear, isn't it?

Mr. Michael: I think—just a minute. I think the witness is a little confused as to the time.

Mr. Cummins: I don't think he is confused.

The Court: I think the witness will explain it. If you have any misconception, tell us about it, or if there was one car or two. [127]

Q. (By Mr. Cummins): There was just one car kicked down here to the No. 9 track, and it didn't go all the way down No. 9, that is accurate thus far, isn't it? A. Yes.

Q. And the entire cut of cars was shoved to a rough coupling against that one car, isn't that the way this happened?

A. There were two cars.

Q. All right. You remember giving a statement, don't you, to Mr. James Anderson, claims agent, on January 5, 1951, Mr. Weith? A. Yes, sir.

Q. Your memory was at least as good about what happened at the giving of your statement as to the events as it is after you have talked with Mr. Seamas and his attorneys, wasn't it?

(Testimony of Sidney Albert Weith.)

A. I have not talked with Mr. Seamas.

Q. Did you talk to his attorneys? A. Yes.

Q. Did his attorneys tell you there were two cars there? A. No, sir.

Q. They didn't, sir? A. No.

Q. They didn't tell you Mr. Seamas testified there were two cars there? A. No, sir. [128]

Mr. Papas: Excuse me, your Honor, we can't listen to his testimony and check this stuff he handed us at the same time.

Mr. Cummins: That is right. I will wait for you.

(Pause.)

The Court: Well, you may proceed, counsel.

Mr. Cummins: I want to use it, your Honor.

The Court: All right, you may use it. Counsel has read it—one of them. If there are any other statements involved in this trial by one side or the other side, I direct they be produced and exchanged so we will not have these interruptions. Do you have any statements, counsel for the plaintiff?

Mr. Papas: I beg your pardon?

The Court: Do you have any statements, or do the defendants have any statements? If you have, interchange them.

Mr. Cummins: This is the only one I will use for impeachment purposes unless another witness is called. If there is, then I will use it.

Q. (By Mr. Cummins): Mr. Weith, this is your signature on the bottom of this page, isn't it?

(Testimony of Sidney Albert Weith.)

A. Yes.

Q. You wrote below it in your handwriting that "I have read the above statement and it is true to the best of my knowledge," didn't you? [129]

A. Yes, sir.

Q. Will you read that statement to yourself, please (handing document to the witness). Doesn't that refresh your memory, Mr. Weith, that there was just one car kicked into the No. 9 track, and that the cut came down against it, the one car?

A. Perhaps.

Q. Thank you. You are sure you heard Mr. Seamas say anything to Mr. Mahan just before this cut of cars hit this one car?

A. Will you ask that again, please?

Q. Are you sure you heard Mr. Mahan or Mr. Seamas say anything to one another just before this alleged accident took place?

A. Just what they said, no.

Q. Did you hear them say anything?

A. Heard them just yell. I didn't pay any attention to what it was. I couldn't hear it.

Q. You don't know who gave the yell, do you?

A. No, sir.

Q. Now, that particular place in that yard is in a little hollow, isn't it, so that frequently when you kick a car in it doesn't roll quite as far as you think it should? A. That is true.

Q. You don't know whether there was a brake set on that car or not, do you?

A. No, sir. [130]

(Testimony of Sidney Albert Weith.)

Q. Would you keep your voice up, please, so everybody will be sure to hear you?

A. I am sorry.

Q. Thanks. Now, how far from Mr. Mahan were you at the time these cars came together—that second kick came, in other words, the last kick move?

A. Oh, three, or four, five car lengths.

Q. Kind of foggy and damp? A. Yes, sir.

Q. How far could you see?

A. As I explained before, about in one position you could see four or five, maybe six cars, and another position you couldn't see only about half that far.

Q. Where was Mr. Seamas just before this last kick move was made? A. In the field.

Q. Do you know where he was?

A. No, sir.

Q. Did you see him? A. No, sir.

Q. Mr. Weith, when you stated here, "Foreman Mahan was working close to me, and when this car did not roll into the clear he gave the engineer a 'come ahead' signal with the intention of giving the car another kick," you were referring there to just one car, weren't you? [131] A. Yes.

Q. There was just one car there, wasn't there, Mr. Weith? A. There was one car to go to 9.

Q. And that is the only one that had been kicked down that track before this claimed injury took place, isn't that true?

A. No, there was another car, too, behind him.

(Testimony of Sidney Albert Weith.)

Q. You didn't say so in your statement anywhere, did you?

A. No, sir. I didn't write the statement.

Q. You gave it to Mr. Anderson, didn't you?

A. Yes.

Q. And you read it? A. Yes.

Q. And you signed it? A. Yes.

Q. Then you stated further, "I judge our cut had to go about three car lengths before it contacted this car which had not rolled into the clear." You were referring to just one car there, too, weren't you?

A. I was referring to the coupling that we were to make.

Mr. Michael: Speak up just a little bit, Mr. Weith.

Q. (By Mr. Cummins): Does that not refresh your memory that there was just one car there and not two? A. I believe there were two cars.

Q. Do you know?

A. Fairly certain, yes. [132]

Q. You didn't see Mr. Seamas after you made that first kick of a car down to the No. 9 track, did you, sir? A. No.

Q. And you didn't see any light or any reflection from a light anywhere about either the one or the two cars that were here (indicating on blackboard), on which Mr. Seamas claimed he climbed to?

A. Mr. Mahan was in that area.

Q. You didn't see any light on the top of the cars or on the other side, north side of the cars—these

(Testimony of Sidney Albert Weith.)

two cars or this one car, did you? A. No, sir.

Q. And you didn't see any reflection from any light in that vicinity either, did you, sir?

A. No, sir. I was working close to the south side of this—of these cars.

Q. You had no idea Mr. Seamas was on either one or two cars here, did you? A. No, sir.

Q. When did you next see Mr. Seamas?

A. Well, it was on the way back to the shanty where we logged in and out.

Q. Did he tell you he had been hurt?

A. He made some statement as to it.

Q. What did he say? [133]

A. Well, he said he was sore.

Q. Did he tell you his back was hurt?

A. No, sir.

Q. At no time before at least the time that you left the yards of the railroad did Mr. Seamas tell you his back was hurt, did he?

A. No, he didn't specify any part of his body.

Mr. Cummins: Your Honor, I ask that the state- of Mr. Weith be marked and admitted into evidence.

The Court: It may be marked in evidence.

(Statement of Mr. Weith was admitted into evidence and marked Defendant's Exhibit A.)

The Court: We will take the noon recess and resume at 2:15—fifteen minutes past two.

Same admonition to you.

(Thereupon a recess was taken until 2:15 o'clock p.m. of the same day.) [134]

Tuesday, October 2, 1951—2:15 P.M.

SIDNEY ALBERT WEITH

called as a witness on behalf of the plaintiff, resumed the stand, previously sworn.

Cross-Examination
(Continued)

By Mr. Cummins:

Q. Mr. Weith, you were in the courtroom this morning, were you not? A. Yes, sir.

Q. While Mr. Seamas was testifying?

A. Yes, sir.

Q. You talked with the attorneys during the lunch hour, have you? A. I said "Hello."

Q. Anything else? A. No.

Q. O. K.

Mr. Cummins: May I have the exhibit—I don't know what the number is. The last one. Your Honor, I would like to read Mr. Weith's statement to the jury at this time. It is defendant's exhibit A. May I suggest to the Court and counsel that I will skip the printed matter on the form.

It is the statement of S. A. Weith, made to J. R. Anderson at Fresno, California, the 5th day of January, 1951.

"My name is S. A. Weith, age 23 years. I reside at 1026 West Cornell, Fresno. I am a yard helper by occupation. Am single. I have worked at the Santa Fe [135] Railway Company about two months.

"On December 9, 1950, I was a helper with yard

(Testimony of Sidney Albert Weith.)

engine No. 2351, the time of accident to helper J. J. Seamas. Our engine was pointed toward the east and we had a cut of five or six cars at the rear of the west end which we had just brought out of the rip track. We were working on east lead and had an end car or most westerly car on cut to be put into No. 9 track. When we got into No. 9 track we gave it a kick, and I pulled the pin, but for some reason the car did not roll into the clear, evidently due to a handbrake sticking.

"At the time we kicked this car Seamas with a lighted lantern was about three car lengths farther west along No. 9 track. The night was foggy and damp, a white ground fog that limited visibility to about four or five car lengths.

"After I pulled the pin on this car I did not see Seamas again and I do not know where he was when the next follow up move was made. I did not know what he was doing. Foreman Mahan was working close to me, and when this car did not roll into the clear he gave the engineer a 'come ahead' sign with the intention of giving the car another kick. I judge our cut had to go about three car lengths before it [136] contacted this car which had not rolled into the clear.

"I cannot say how fast the cut was going when impact took place with the car we wanted to kick into the No. 9 track, but it was an unusually hard coupling and one that would have required a person on the car to have a very tight and firm hold to prevent his being knocked off.

(Testimony of Sidney Albert Weith.)

"As before indicated, when I last saw Seamas before this last move was made, he was on the opposite side of the track from where we were working, and after we made the first kick of the car to No. 9 track I did not see him any more. I could see the end car before we made second contact with it, and I did not see the lantern or reflection of a light on the end or brake end of the car and I had no idea Seamas was on it. Our moves were all made in a westerly direction and the brake on this end car was on the west end of the car. I had no personal knowledge Seamas was on the car when we kicked it or at any other time.

"The next time I saw Seamas following the last kick of the car into No. 9 track was when I was going down No. 10 track with the engine, when he and Mahan walked over and got on the footboard. Seamas was rubbing his leg and said he had bumped it. Mahan [137] asked him if he was hurt and he said it was nothing. After we were tied up and in the yard office Seamas told me he had been on the brake platform of the car when we made the move for the second kick, and the impact had knocked him to the ground. But, as is stated before, I did not see him or his lantern on the car and have no knowledge outside the statement made by Seamas himself that he was on it.

"I have read the above statement and it is true to the best of my knowledge.

"SID A. WEITH.

"Witness,

"J. R. ANDERSON."

(Testimony of Sidney Albert Weith.)

Q. (By Mr. Cummins): Mr. Weith, could you tell us, how long is it that you have been a switchman? A. Three months.

Q. Are you familiar with the operation of an Ajax brake? A. Yes, sir.

Q. Do you know, sir, that you are able to operate an Ajax brake, release it, simply by pulling a lever?

A. Yes, sir.

Q. You don't have to crawl up on the brake platform to do that, do you? A. No, sir.

Q. You can release it with a very easy touch from the side ladder of the car, can't you, sir? [138]

A. Not always.

Q. Well, generally? A. Generally.

Q. And you can also release it from the catwalk on the top of the car by simply moving it without going down on the brake platfrom at all, can you not? A. It is possible.

Mr. Cummins: That finishes my cross-examination.

Redirect Examination

By Mr. Michael:

Q. Mr. Weith, in releasing these Ajax brakes on these cars, if a brake is stuck or is jammed against the wheel can it be released by merely flipping a lever?

Mr. Cummins: Objection. There is no evidence in this case that the brake was stuck.

The Court: Overruled. That might be answered

(Testimony of Sidney Albert Weith.)

as a hypothetical question. You might answer it, please.

A. Well, it isn't always a rule that it can be released by just merely flipping it, and I know you want to hold on with one hand and get a grip on it. Personally I wouldn't release a brake from that position, from the end of the car and just lean over.

Q. Unless you stepped over to the brake platform? A. That is right.

Q. If you were to release a brake from the top of a car, [139] wouldn't that entail getting down on your knees and bending over to raise the lever?

Mr. Cummins: Objection. Leading and suggestive.

The Court: Overruled.

Mr. Michael: You may answer.

A. Yes, you would have to get down on your knees to release it.

Mr. Michael: May I see the exhibit, please?

Q. Mr. Weith, calling your attention to this statement that has been introduced in evidence, who took this statement from you?

A. Mr. Anderson.

Q. And who is Mr. Anderson? What does he do?

A. He is the claims adjustor for the Sante Fe Railroad.

Q. I notice that this statement is typed out. Did you type it out? A. No, sir.

Q. Who typed the statement out?

A. Mr. Anderson.

(Testimony of Sidney Albert Weith.)

Q. And did he type it out at the time you gave him the statement? A. Yes, sir.

Q. And is the statement typed out word for word as you gave it to Mr. Anderson?

A. No, sir. [140]

Q. What does this statement reflect? The gist of the conversation that you had with Mr. Anderson?

Mr. Cummins: That is a conclusion, your Honor. Object to that, leading and suggestive; further, incompetent and an opinion of the witness.

The Court: Overruled.

Mr. Michael: You may answer, Mr. Weith.

A. Will you repeat the question again, please?

Mr. Michael: Will you read the question back, Mr. Reporter, please?

(Question read by the reporter.)

A. Yes.

Q. (By Mr. Michael): Did Mr. Anderson ever ask you whether one or two cars were kicked?

A. Directly, I don't remember.

Q. You don't remember? Now, you were subpoenaed to testify today, is that correct?

A. That is right.

Q. And you were subpoenaed on behalf of Mr. Seamas? A. That is right.

Q. And I contacted you and asked you to come up and testify on his behalf?

A. That is correct.

Mr. Michael: I think that is all I have, your Honor. [141]

(Testimony of Sidney Albert Weith.)

Recross-Examination

By Mr. Cummins:

Q. Mr. Weith, do you really mean you have to get down on your hands and knees on a catwalk of a car to release an Ajax brake? A. Yes, sir.

Q. You have had three months experience as a switchman? A. Yes, sir.

Q. Is there anything in this statement that is false (handing document to the witness)?

A. I don't believe there is.

Mr. Cummins: Thank you. That is all the questions I have. Thank you, sir.

(Witness excused.)

Mr. Papas: I would like to call Mr. Strain as the next witness for the plaintiff, your Honor.

MILTON G. STRAIN

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Milton G. Strain, Marin City; House 162; Locomotive fireman for the Northwestern Pacific.

Direct Examination

By Mr. Papas:

Q. Mr. Strain, how long have you been employed by the Northwestern Pacific Railroad? [142]

(Testimony of Milton G. Strain.)

A. Oh, approximately about four and one-half, maybe five months.

Q. About five months?

A. Something like that.

Q. Do you recall when you went to work for that company? A. I think it was June the 5th.

Q. Of this year? A. Yes.

Q. Were you employed—where were you employed prior to that time, Mr. Strain?

A. Santa Fe.

Q. Would you be good enough to tell us when you first began working for the Santa Fe Railroad?

A. In July, 1946.

Q. And you worked continuously for the Santa Fe Railroad from July, 1946, until June of this year, is that correct? A. Yes, off and on.

Q. Were you working on the extra board?

A. Yes.

Q. I see. In what capacity were you working for the Santa Fe Railroad Company from 1946 until June of this year? A. Locomotive fireman.

Q. Locomotive fireman? A. Yes.

Q. Mr. Strain, I know most of us have very little knowledge [143] about what firemen do on a locomotive. Would you be good enough to tell us in a general way just what you do as a locomotive fireman?

A. Well, it is just more or less to keep—be on the lookout for signals on your side, that anything that comes up, or just in general be on the lookout. On a steam engine he has to keep the water and the

(Testimony of Milton G. Strain.)

steam and his side of the engine going along with keeping on the lookout.

Q. I take it you help the engineer as well?

A. Yes.

Q. May I ask you, Mr. Strain if you were employed by the Santa Fe Railroad Company on December 9, 1950? A. Yes, I was.

Q. Were you employed in the capacity of a locomotive fireman? A. Yes.

Q. And did you go to work on that day?

A. Yes, I did.

Q. Where did you go to work, Mr. Strain?

A. At the Mormon yards in Stockton.

Q. Is that a fairly large yard as railroad yards go? A. Well, to a certain extent it is.

Q. I see. Mr. Strain, I don't know whether you have seen this diagram on the board or not. We have drawn a diagram on the board which purports to show in a general way the track layout at the Mormon yard. Does that refresh your recollection as [144] to the track layout there? A. Yes.

Q. Is there a curve at this point (indicating on diagram)? A. Yes.

Q. And is there a curve later on on this track that is designated as a tail track?

A. Yes, there is.

Q. Is this area straight for a certain distance?

A. Yes.

Q. Mr. Strain, would you be good enough to tell us what time you went to work on December 9th, of 1950?

(Testimony of Milton G. Strain.)

A. I think it was the 3:59 switch engine.

Q. Were you working with a crew?

A. Yes.

Q. With a group of other men, I mean?

A. Yes.

Q. Would you be good enough to tell us who the other men were?

A. Mr. Marrs was engineer. Mr. Mahan was foreman. Joe Seamas was a helper and Mr. Weith was the pinpuller.

Q. And, Mr. Strain, what did you do after you went to work, that is, that afternoon? Did you work around this general area?

A. Yes, just around the general yards.

Q. Switching cars? A. Yes.

Q. Did you move certain cars from one track to another? [145]

A. Yes, that is what switching is.

Q. What was the weather like when you went to work at approximately 3:59 that afternoon?

A. As far as I remember it was clear.

Q. Clear? A. Yes.

Q. Was the sun out? A. I think it was.

Q. Did you have occasion to go to dinner that night—that day? A. Yes.

Q. Approximately what time did you go to dinner, Mr. Strain?

A. That I can't say now. It is too long ago.

Q. After you went to dinner did you begin working again? A. Yes.

Q. And do you recall after having had dinner

(Testimony of Milton G. Strain.)

whether you went to the area designated on the blackboard as a rip track for the purpose of picking up some cars?

A. Yes, we went to the rip track to pick up cars.

Q. Do you recall how many cars it was you picked up there, Mr. Strain?

A. No, I don't. It is too long ago. It was too dark.

Q. May I ask you what your position was on the locomotive, on the engine?

A. I was running it at the time. [146]

Q. You were running it? A. Yes.

Q. In which direction was the engine facing?

A. East.

Q. It was facing east? A. Yes.

Q. By that you mean the head of the engine was facing in this general direction (indicating), is that correct? A. Yes.

Q. And you had hold of another five cars on the rear of the engine? A. Yes.

Q. Did you proceed, then, in an easterly direction or northeasterly direction?

A. Yes, that is right.

Q. I take it by that time it was dark?

A. Oh, yes.

Q. Was it fairly dark?

A. It was dark, black.

Q. What were generally the conditions of the weather?

A. Well, just fog here and fog there; just a tule fog.

(Testimony of Milton G. Strain.)

Q. I see. Is that area where the Mormon yard is situated known for the fog which it receives?

A. Yes, that end of the yard is.

Q. Can you tell us whether that is situated in a pocket? [147]

A. Yes, that end of the yard is.

Q. Mr. Strain, as you proceeded along this track designated on the board as the lead track, on which side of the engine were you?

A. Let's see, I was on the right side of the engine.

Q. On the right side? A. Yes, sir.

Q. I see. In other words, then, the head of the engine is in this direction and you were over on the right side? A. Yes.

Q. Pertaining to the head of the engine, is that right? A. Yes.

Q. Who was opposite you?

A. The engineer.

Q. What were his duties?

A. It would be the same as mine.

Q. You changed places with him, in other words?

A. Yes.

Q. May I ask, just as a general information, is that customary for the purpose of training the fireman to become an engineer? A. Yes, it is.

Q. Thank you. And, Mr. Strain, we have an "X" marked on here and an "M" below it, and is designated as the bull switch. Is there also a switch at this point designated as No. 7 switch point? [148]

A. As far as I remember, there is.

(Testimony of Milton G. Strain.)

Q. There is.

Mr. Papas: Can we mark that, your Honor?

Q. Now, Mr. Strain, as you proceeded in this general direction, northeasterly direction, were the other members of the crew, if you can recollect, with you or near you?

A. Well, they were out on the cars.

Q. They were on the cars? A. Yes.

Q. Could you see them, or could you see their lights? A. No, just see their lights.

Q. You couldn't see them? A. No.

Q. You wouldn't be able to tell us whether Mr. Seamas or Mr. Weith or Mr. Mahan were at the middle or tail or near the engine? A. No.

Q. All you could see was their lights?

A. That is right.

Q. Mr. Strain, when you approached the area of what is designated on this blackboard as No. 9 switch point, did you slow down?

A. Yes, because I seen a man drop off.

Q. You saw a man drop off?

A. Yes. [149]

Q. Did you know who that man was?

A. No.

Q. Was it the man that was at the end of the five—the string of cars you had hold of?

A. I think he was the last man.

Q. Were you able to see him or movements which he made after he got off at that point?

A. No, sir.

Q. You were not? Did you know at that time

(Testimony of Milton G. Strain.)

what this man was doing? A. No, I didn't.

Q. Do you at any time when you are on the engine know what the other men of the crew are doing?

A. Once in a while if we have the time we may explain what moves we are going to make and how they are to move.

Q. How do you generally get your instructions?

A. By signal.

Q. It is a hand signal during the day?

A. Yes.

Q. And you use a light during the night?

A. Yes.

Q. Mr. Strain, did you go up along this back lead on that tail track after this man whose light you saw got off at this point? A. Yes. [150]

Q. Would you be good enough to tell us approximately how far you traveled in an easterly direction on this tail track after you passed the bull switch?

A. That is hard to say because it was a black night and I was more or less following lights. Just keep going until you get your signal and stop, so I couldn't say how far back we did go on the back track.

Q. You couldn't tell us whether it was three or four or five car lengths?

A. Not from the switch. It was too dark. I do know we went back on the back track quite a ways.

Q. You went quite a ways in this direction?

(Testimony of Milton G. Strain.)

A. Yes.

Q. Did you receive a stop signal after you got to this point? A. Yes.

Q. Do you recall who gave you that stop signal?

A. No.

Q. May I ask, for a matter of information, who generally gives the signals on the crew?

A. The foreman.

Q. The foreman? A. Yes.

Q. And do any of the other members of the crew occasionally give the signals?

A. Oh, yes. [151]

Q. And who are the other members of the crew that might give a signal?

A. Well, the field man can give them, or the pinpuller. Whenever you get a cut of cars, the pinpuller might signal or run the car into one of the cuts to be pushed, and the foreman, he gives the signal, grabs hold of the last one, backs that cut of cars.

Q. Mr. Strain, do you recall whether you saw anyone get off at that bull switch, off the string of cars you had there?

A. Yes, I am pretty sure a man got off at the bull switch.

Q. Did anyone else get off as you pulled easterly on the tail track?

A. Yes, there was another light up by the cars.

Q. Could you tell us approximately how far apart these were? A. No, I cant.

Q. We realize it was dark and foggy. Now, Mr.

(Testimony of Milton G. Strain.)

Strain, after these two men got off you did receive a stop signal? A. Yes.

Q. Who was the man who gave you this stop signal? A. The man at the switch.

Q. The man at the switch? You mean the bull switch? A. Yes.

Q. You don't know who that man was?

A. No.

Q. Will you tell us, is it customary to have the foreman at [152] the bull switch, if you know, or is it customary to have some other member of the crew at that point?

A. It is customary for the foreman, unless he is breaking in a pinpuller or field man in to being a foreman.

Q. Is the position of the pinpuller between the foreman and the engine? A. Yes.

Q. What is the purpose of that, Mr. Strain, would you be good enough to tell us?

A. That is in case we were kicking cars out some place, the pinpuller is there to release the cars, pull the pin to release the cars.

Q. I see. And after you stopped on the tail track, did you receive a signal to kick a car?

A. Yes, I did.

Q. Mr. Strain, which one of these men gave you that kick signal? A. The man at the switch.

Q. The man at the switch? A. Yes.

Q. Was that signal relayed to you by the man between the switch point and the engine?

A. I can't recall whether it was or not.

(Testimony of Milton G. Strain.)

Q. You can't recall? Very well. Now, we have a lantern here which has been introduced in evidence, that is customarily used [153] by railroad men, is that correct? A. Yes.

Q. You recognize this? A. Yes, I do.

Q. And I know that most of us—at least I don't know the type of signal you get for the kicking of a car. Would you be good enough to show us, please? (Handing lantern to the witness.)

A. It is just like this, if you are backing up (demonstrating), or down fast like this for a go ahead kick.

Q. After you received this kick signal, what did you do? A. I kicked.

Q. You kicked the car? A. Yes.

Q. By that you mean you started to back, and after having received sufficient momentum, why, the pinpuller lifted the pin and the car was released?

A. Yes, that is right.

Q. Did you know where that last car, or the westerly most car, was going to?

A. To my knowledge, no.

Q. You did not? That you don't know?

A. That's right.

Q. And were you able to see how far that first car that was kicked traveled? [154]

A. No, sir.

Q. You couldn't see it? A. No.

Q. I see. Now, Mr. Strain, to clarify one point further, at or near this No. 7 switch point is there

(Testimony of Milton G. Strain.)

some sort of a structure, wooden structure near there?

A. Yes, there is a switch shanty up there.

Q. Is that where this rectangle or square shaped marking is on the blackboard?

A. Yes, about that.

Q. Is that about the place it is located?

A. Yes.

Q. This was a shanty? A. Yes.

Q. What is that place used for, Mr. Strain?

A. Oh, for switchmen to go in out of the rain when they are getting a switch list, or the yardmaster is talking to them on the telephone.

Q. Does that shanty have a light in it?

A. No.

Q. Does it have a telephone? A. Yes.

Q. After that first car was kicked, Mr. Strain, I take it that you moved on or you backed a little closer to the bull switch? [155]

A. Yes, that is right.

Q. And did you then move forward again?

A. I can't recall whether we did or not.

Q. Did you receive—after kicking this first car, did you receive another signal?

Mr. Cummins: Pardon me, Mr. Papas. I am going to object to that question, to the use of the term "after you kicked this first car." This witness has not testified there was any first or second or third car that was kicked. He wouldn't know because he personally was not able to see anything but a lantern. The attorney is therefore stating

(Testimony of Milton G. Strain.)

something not in evidence in this witness' testimony.

Mr. Papas: I will rephrase the question, your Honor.

Q. Mr. Strain, after you received that first kick signal from the man at the bull switch, were you able to tell whether or not the car was released?

A. No.

Q. You were not? A. No.

Q. I see. Then after that signal was given to you, was there any other signal given to you?

A. I think I got another kick signal after that.

Q. You got another kick signal after that?

A. I am pretty sure I did.

Q. Do you recall after having received the second kick [156] signal whether you started to back up for the purpose of kicking another car?

A. Yes, I did.

Q. And do you know whether or not that car was released from the string of cars that you had?

A. No, I don't.

Q. After having received that second kick signal, I take it that you moved a little closer to the bull switch? A. Yes.

Q. Can you tell us how far, after having received that second kick signal and starting to back up, you were from the bull switch?

A. I couldn't say now. It has been too long ago.

Q. I see. Mr. Strain, after you receive the kick signal and the car is kicked, do you then receive a stop signal? A. Yes.

(Testimony of Milton G. Strain.)

Q. Do you recall, after having received the first kick signal, whether you received a stop signal?

A. Yes, I received a stop signal at both signals.

Q. Did that mean anything to you?

A. To stop.

Q. To stop? Well, after having received a stop signal were you of the opinion that the car had been released?

Mr. Cummins: Objection. Incompetent.

The Court: Overruled. [157]

Q. (By Mr. Papas): You may answer, please.

A. Yes, I taken it for granted they had been released.

Q. After having received the second kick signal and starting to back up, did you then receive a stop signal? A. After the second kick signal?

Q. Yes, sir. A. Yes, sir.

Q. What did that indicate to you?

A. To stop.

Q. Did you have any—did you believe the car had been released? A. Yes.

Q. Did you have any reason to believe otherwise?

A. No.

Q. Mr. Strain, after you had received the second stop signal were you able to see a light of the man between the bull switch and the engine?

A. Yes, I saw him at all times.

Q. You saw him at all times? A. Yes.

Q. Is it customary when working in this yard to have the men working in the southern part of this track? A. Yes.

(Testimony of Milton G. Strain.)

Q. Is that purpose, the purpose of that being to have the men visible to the engineer at all times, is that correct? [158] A. That is right.

Q. Well now, Mr. Strain, did you after having stopped the second time receive a back-up signal?

A. Yes, I did.

Q. I see. Now, just before you received that back-up signal were you delayed for any length of time in this area?

A. Well, it wasn't exceptionally long, no.

Q. Were you able to see if there was more than one light here at the bullswitch? A. No.

Q. You still could see that one light?

A. Oh, yes.

Q. You didn't know who the man was?

A. No.

Q. Did you see the light at any time of any employee or crewman in this area (indicating)?

A. I can't see over there.

Q. In other words, from this position you can't see out here, is that right?

A. From clear back at the back track I can for a certain length of ways.

Q. Mr. Strain, after you received the back-up signal did you begin to back up? A. Yes.

Q. And who gave you that back-up signal? [159]

A. The second lantern from me.

Q. By that do you mean the man that you said was over near the bull switch?

A. Yes, that's right.

(Testimony of Milton G. Strain.)

Q. And you say you don't know who that person was? A. No, sir.

Q. Did you assume it was a member of the crew?

A. Yes.

Q. And now after having received this back-up signal from the man at the bull switch, can you tell us whether you saw the man at the bull switch leave that stand?

A. If I am not mistaken he walked away a little ways.

Q. He walked away? A. Yes.

Q. Could you tell whether he was backing up or going forward? A. No, I couldn't.

Q. Could you see the shanty from where you were?

A. I think I could see the outline of it just dimly.

Q. You could see it dimly? A. Yes.

Q. Where did you feel this man was going?

A. I couldn't say.

Q. Did he start to walk toward the shanty?

A. That is what the light indicated.

Q. Now, what happened after you backed up, Mr. Strain? [160]

A. We rammed into something hard.

Q. You ran into something hard? A. Yes.

Q. Can you tell us by looking at the picture on the blackboard approximately where you rammed into something hard?

A. It would be about on the second switch.

Q. By the second switch?

(Testimony of Milton G. Strain.)

A. Yes, the first switch past the bull switch there.

Q. The first switch past the bull switch?

A. Yes.

Q. By that do you mean it was on the back lead track or on the lead track?

A. I couldn't say. It was too dark.

Q. Did you hit quite hard, Mr. Strain?

A. Yes, we did.

Q. Do you recall whether or not you coupled onto any car or cars? A. No, I can't say.

Q. Were you able to see whether or not any cars rammed into something hard?

A. No, I couldn't.

Q. Were you aware that Mr. Seamas was in the area of that first car that you had kicked, Mr. Strain? A. No, I wasn't.

Q. I see. Can you tell us approximately, if you can [161] recollect, how fast you were backing up when you hit something hard?

A. Well, I wasn't going very fast because I got a "slow-easy" signal to back up. Maybe three or four miles an hour.

Q. Mr. Strain, when you hit something hard at this point designated, as you say, the No. 7 switch point, did you then receive a stop signal?

A. Yes, I did.

Q. Was that an easy stop signal or violent?

A. Violent.

Q. Do you recall which one of these men gave you that violent stop signal?

(Testimony of Milton G. Strain.)

A. If I am not mistaken, I got the signal from both lanterns down there at the same time.

Q. From both lanterns at the same time?

A. I think so.

Q. Now, were you aware of the object that you had come up against? A. No.

Q. When did you next see Mr. Seamas, Mr. Strain? A. It was down at the switch shanty.

Q. At the switch shanty? A. Yes.

Q. Going back a moment, might I ask you this: I take it that you have had some experience in running an engine. A. I have a little. [162]

Q. And I take it that you have received some instructions as to how an engine should be run?

A. Yes, that is right.

Q. And I take it you have received signals by light from the foreman and from the other members of the crew as to what to do?

A. Yes, that's right.

Q. Would you be good enough to tell us, Mr. Strain, that when you back up for the purpose of making a coupling, is there a custom of stopping just before——

Mr. Cummins (Interposing): Objection, leading and suggestive.

Mr. Papas: May I finish the question first, your Honor?

Q. ——of stopping just before the coupling is made?

Mr. Cummins: Objection.

A. That is the custom. That is habit.

(Testimony of Milton G. Strain.)

Mr. Cummins: Objection, leading and suggestive; and also I ask your Honor not to permit the same question to be asked until some other questions have been asked, because the witness is fully informed and——

Mr. Papas: Your Honor, he has been employed by the Sante Fe for a period of time, has operated an engine, he has received signals from other members of the crew on many occasions. He can tell us what the custom is as to coupling on to other cars.

The Court: All right, I will admit it. [163]

Mr. Papas: You may answer, Mr. Strain.

A. Yes, that is a custom.

Q. Is it a custom to receive a stop signal just before the coupling is made? A. Yes.

Mr. Cummins: Objection.

The Court: Overruled.

Q. (By Mr. Papas): Is there any other signal that might be given, sir?

A. Well, an easy signal.

Q. Easy signal? A. Yes.

Q. Will you be good enough to demonstrate to us what that easy signal is and what the stop signal is?

Mr. Papas: May I approach the witness, your Honor? Thank you.

A. It is approximately, get maybe three, two and one half car lengths from the cut of cars, the switchman will raise his lantern like this (demonstrating) and as you get closer he will keep giving you the signal like that, and just before you tie in to it he

(Testimony of Milton G. Strain.)

will give you a stop signal. That is to give you time for your slack to run out and you make an easy joining.

Q. Did you receive an easy signal, Mr. Strain?

A. No, I didn't.

Q. Did you receive a stop signal before you banged into [164] something hard?

A. No, sir.

Q. You stated you received the signal after you had made the impact? A. Yes.

Mr. Cummins: Asked and answered.

Mr. Papas: May I have a recess at this time, your Honor?

The Court: We will take the afternoon recess, ladies an gentlemen. Same admonition to you not to discuss the case under any conditions and not to form an opinion until it is submitted to you.

(Recess.) [165]

Mr. Papas: May we proceed, your Honor?

The Court: Yes.

Q. (By Mr. Papas): Mr. Strain, after you hit something very hard you stated that you stopped. Would you be good enough to tell us, if you can remember, approximately where you stopped?

A. It was on the outside of that bull switch—I can't say how many cars, or how close they were at all.

Q. But it was in this general area, the general area of the bull switch? A. Yes, sir.

Q. What did you do then, Mr. Strain?

(Testimony of Milton G. Strain.)

A. As far as I remember, we went ahead and finished our work.

Q. Do you recall whether or not you came down this back lead for the purpose of picking up another car?

A. I can't say whether we did or not. It has been too long ago.

Q. I see. Now, do you recall whether you heard a bang in the area where these two cars are marked? A. No.

Q. You don't recall that? A. No, I don't.

Q. Mr. Strain, may I ask you from the position that Mr. Marrs was in could he see in the area designated as the back of the lead track?

A. No, he couldn't.

Q. He could not. Now, Mr. Strain, when did you then see Mr. Seamas? [166]

A. It was down at the shanty.

Q. At the switch shanty? A. Yes.

Q. How soon after you say you had this collision or this violent banging did you stop working?

A. Oh, maybe 30, 45 minutes.

Q. And I take it that you saw Mr. Seamas at the switchman's shanty after you had finished working? A. Yes, that is right.

Q. Do you recall what time it was when you did finish working? A. No, I don't.

Q. Were the other members of the crew at the switchmen's shanty?

A. Yes, I think they were.

Q. Mr. Marrs was there? A. Yes.

(Testimony of Milton G. Strain.)

Q. Mr. Mahan was there? A. Yes.

Q. And was Mr. Seamas there?

A. Yes, he was.

Q. Mr. Weith? A. Yes.

Q. And was anyone else there besides yourself and these men?

A. Well, I think there was another crew there. Either they were tying up, or else getting ready to go to work. [167]

Q. Did you have a conversation with Mr. Seamas about this violent banging that took place?

A. If I ain't mistaken, I think he made some remark, "What are you trying to do, get rid of me?" or something like that, and then he showed me his legs where it was all skinned up.

Q. Were both legs skinned up?

A. I can't recall, but I knowed he showed me one of his legs that were skinned.

Q. Did he make any complaints to you about any injuries besides the legs that he may have sustained?

A. Well, he was saying that he felt pretty punk, that he would wait until tomorrow to see how it turned out, see how he felt before he made out his accident report.

Q. And it is customary to make an accident report immediately after an accident?

A. As soon as possible.

Q. I see. Do you recall whether or not the Interstate Commerce Commission from your knowledge requires that an accident report be made out?

(Testimony of Milton G. Strain.)

A. I think they do.

Q. Is there a considerable amount of paper work, if you know, connected with the making of an accident report?

A. Well, we have to make out three copies of it.

Q. I see. Does the company encourage or discourage the making of these accident reports? [168]

A. Encourages——

Mr. Cummins: I object to that.

The Court: Objection sustained.

Mr. Papas: Very well, your Honor.

Q. Mr. Strain, did you see Mr. Seamas after you saw him at the switchman's shanty?

A. No, I didn't.

Q. Did you talk to Mr. Mahan? A. No.

Q. Did you talk to Mr. Marrs?

A. I can't recall whether I did or not, but I know I seen Mr. Marrs after the accident.

Q. Mr. Strain, I take it that you have talked to Mr. Anderson?

A. I think I have. It has been so long ago that I have forgotten. I believe it was.

Q. And I take it that he asked you if you knew anything about the accident?

A. He must have.

Q. And do you recall whether or not you made a statement to him concerning the accident?

A. No, sir, I don't, to be frank with you.

Q. You don't remember? A. No, sir.

Q. Is it possible that you may have made a statement to him?

(Testimony of Milton G. Strain.)

A. I could have, but in the length of time that has elapsed [169] between it I have more or less forgot about the accident that Seamas had. It more or less passed out of my mind.

Q. Of course you talked to me about what you knew about the accident, is that correct?

A. Yes, that is correct.

Q. And Mr. Michael was there, and I was there when you talked to us about it? A. Yes.

Q. We have never told you that you were going to be paid for coming here, have we? A. No.

Q. And may we ask you, you were subpoenaed to come here? A. Yes, I was.

Mr. Papas: No further questions. You may cross-examine.

Cross-Examination

By Mr. Cummins:

Q. Mr. Strain, you mentioned when Mr. Papas asked you one particular question in regards to Mr. Mahan or the man standing at what has been termed the bull switch on Exhibit 3, he asked you if you saw that man walk toward the switch shanty or the shanty there on Exhibit 3, and you answered, "If I am not mistaken, he did."

A. That is right.

Q. Might you be mistaken? A. No.

Q. You don't think so? [170]

A. I know I am not.

Q. That is just a manner of speaking on your part then, sir? A. Yes.

(Testimony of Milton G. Strain.)

Q. You meant to say, "Yes, he did walk toward the shanty," is that right?

A. He started to walk away from the switch.

Q. Now, how far was the lantern near the bull switch from the other lantern that you saw?

A. I don't know.

Q. You have no idea?

A. No, sir, it was too dark.

Q. Did you say that just before this impact took place you were operating on a slow signal?

A. That is right.

Q. How fast were you going?

A. Approximately two, three, four miles an hour.

Q. You have operating instructions, don't you, on how fast it is permissible to hit a car when you are coupling them together or kicking them?

A. There have been instructions out.

Q. Those instructions are not to exceed approximately five miles per hour, aren't they?

A. I think it is four.

Q. Four? A. Yes, sir. [171]

Q. In other words, if you hit a car at more than four miles per hour you are liable to do damage to someone on a car? A. That is right.

Q. Or the lading in the car? A. Yes.

Q. So as a matter of practice and custom as well as instructions, you, as a fireman when you operate an engine undertake and attempt to always keep under four miles per hour?

A. That is right.

(Testimony of Milton G. Strain.)

Q. And in this case just before you made contact with that car which you have termed very violent, you were going how fast?

A. Between two to four miles per hour?

Q. Is that very violent?

A. It is when you hit something that is stopped.

Q. It has been nine months since this accident happened, hasn't it?

A. I guess so. I never counted them back.

Q. Well, December 9th until the present date. Is your memory clear on exactly the moves you made leading up to this coupling when you kicked this back car? A. Pretty clear.

Q. Do you think it was any clearer two or three weeks after the accident took place?

A. I think so.

Mr. Cummins: May the record show, your Honor, that I have [172] already showed this particular statement to counsel before the recess—well, before the recess when they first started questioning the witness.

Q. (By Mr. Cummins): Is this your signature, Mr. Strain? A. Uh-huh.

Q. Is that your writing above it to the effect, "I have read the above two pages and as far as I can recall this statement is true and correct"?

A. The statement I signed?

Q. Yes. You want to look at both pages? I am going to let you read it if you will tell me first if that is your signature, sir.

A. As far as I recall it is my signature.

(Testimony of Milton G. Strain.)

Q. Do you recognize your signature, Mr. Strain?

A. I recognize this one better (indicating).

Q. Is this also your signature at the bottom of the first page? A. Yes, it could be.

Q. Is this your writing, the interlineation on the statement? A. I think it is.

Q. Go ahead and read it, sir.

(Counsel hands witness the statement.)

Q. (By Mr. Cummins): Does that refresh your memory as to how fast you were going just before the impact? A. That is right.

Q. How fast were you going? [173]

A. It says here two and a half miles an hour.

Q. All right, sir. Now, I wonder if you read it carefully enough—if you didn't, please feel free to take time to read it again, but doesn't your statement there mention two kick signs only and not three?

A. That is right, I didn't say we got three kick signs.

Q. Well, isn't this the way this thing happened? You got one kick signal and then a stop sign?

A. That is right.

Q. You don't know whether one car was released or more than one? A. That is right.

Q. As a matter of fact, you really don't know from your own knowledge if any were released. You just know that you got a kick signal and a stop signal; isn't that right?

A. That is right.

(Testimony of Milton G. Strain.)

Q. Then you got another kick signal and then a back-up sign. The back-up sign followed the kick sign, didn't it?

A. It followed the stop sign.

Q. Is that what your statement says?

A. Well, anybody would know that you have got to get a stop sign from a kick signal.

Q. Is this your statement, "We had just pulled a cut of I don't know how many cars we had from the rip track. The night was dark and foggy and I could not see too far. I got a kick [174] signal, made a kick move toward the west, then got a stop signal and brought the cut to a stop. I do not know how many cars were kicked, whether it was one or more than one. I was working on signals. After I got the stop signal and stood still a few signals I got another kick and then back-up signal and was moving toward the west at two and one-half miles an hour when the end of the cut I was handling struck a standing car or cut of cars, I do not know which." Is that your statement? A. Yes.

Q. In the face of that statement is it still your testimony that you got two kick signals and two stop signals and then another kick signal?

A. I only got two kick signals.

Mr. Cummins: Thank you.

Your Honor, I would like to introduce this statement in evidence.

The Court: It may be marked on behalf of the defendant.

The Clerk: Defendant's Exhibit B in evidence.

(Testimony of Milton G. Strain.)

(Thereupon the statement above referred to was received in evidence and marked Defendant's Exhibit B.)

Q. (By Mr. Cummins): How long have you been a fireman, sir?

A. Well, off and on ever since 1946.

Q. A period of five years?

A. Approximately five years. [175]

Q. During that time have you been a runner?

A. No.

Q. Well, have you run an engine?

A. A little bit.

Q. Have you been—have you ever been familiar with the operating rules of the Santa Fe Railroad? You had to study those rules?

A. Not too well.

Q. Well, you have to take some exams on them, haven't you?

A. No, not until you get your engineer's test.

Q. Did you ever take an engineer's test?

A. I started it.

Q. Well, it is not my purpose to ask you what your grades were in a thing of that sort. I am wondering if you are familiar with rule No. 813 of the Santa Fe rules. Would you gentlemen like to see Rule 813?

Mr. Papas: Yes, thank you.

Q. (By Mr. Cummins): I will not ask you what it reads like. I will show it to you. There are a lot of rules in that book.

(Testimony of Milton G. Strain.)

(Counsel hands book to witness.)

Q. (By Mr. Cummins): Now that rule, Mr. Strain, doesn't mean this in practice. That you, when you are operating an engine, must have a light of a switchman at all times in view? If the light goes out of your view you must stop?

A. Right. [176]

Q. Now, the light of a switchman didn't go out of your view in this instance, did it?

A. No, it didn't.

Q. You followed that rule, didn't you?

A. That is right.

Q. As a matter of fact, you had two lights within your view, didn't you? A. Yes.

Q. Now, Mr. Seamas didn't complain about his back to you the evening of the accident, did he?

A. No.

Q. Didn't mention his back to you, did he?

A. No.

Q. He showed you some scratches on his leg?

A. That is right.

Q. Describe it, will you please, to the best of your memory, if you can?

A. To tell you the truth, I don't know exactly how they were. I know his legs and shins were skinned up.

Q. Had skinned places on them? A. Yes.

Q. How about his hands?

A. I can't say now. It has been too long ago.

Q. Just one or two other things. Mr. Strain, the

(Testimony of Milton G. Strain.)

company requires—it is a positive requirement that you make an [177] accident report where there has been an accident, doesn't it? **A. Yes.**

Q. To make a 1428 report?

A. That is what I can't remember, whether I did or not.

Q. Well, I mean are you required to make a report? That is my question.

A. Well, you are—no, I mean yes, they will send you one out if the party who is hurt is putting in a claim.

Mr. Cummins: That is all, thank you.

Redirect Examination

By Mr. Papas:

Q. May I see that last exhibit in evidence? I don't think it was read, your Honor. Might we read it at this time so everyone will know what the contents are:

"Santa Fe Coast Line

"Statement relating to accident. To Joseph J. Seamas, a yard helper at Mormon, California, December 9, 1950; hour, 10:00 p.m.

"Instructions: Party making statement should read and sign same and his signature should be witnessed by party to whom statement was made.

"Statement of M. G. Strain made to J. R. Anderson at Richmond, California, on the 4th day of January, 1951.

"In the presence of ..... My name is M. G. Strain, age .... years. I reside [178] at Richmond, California; telephone number is Bea-

(Testimony of Milton G. Strain.)

con 4451. I am a locomotive fireman by occupation, am married. I have been in the service of the Santa Fe about four years.

"On December 9, 1950, I was a fireman on yard engine No. 2351 and was operating engine at time of accident to Mr. Seamas, yard helper. Our engine was headed east and we were in backward motion toward the west. We had just pulled a cut of—I don't know how many cars we had from the rip track. The night was dark and foggy and I could not see too far. I got a kick signal, made a kick move toward the west, then got a stop signal and brought the cut to a stop. I don't know how many cars were kicked, whether it was one or more than one. I was working on signals.

"After I got the stop signal and sit still a few seconds I got another kick and then back-up signal and was moving toward the west at about two and a half miles an hour when the end of cut I was handling struck a standing car or cut of cars, I don't know which. I had not received any easy signal before contacting this standing car or cars and therefore the impact was a little harder than usual. Right after this move we tied up. In the office after we tied up helper Seamas told me he had been on the brake platform of the car we struck in making our last move and the impact was so hard it knocked him off. As I understood he said he was on the brake platform to release the hand brake. He showed me some scratches and bruises on his leg, but I do not recall which leg it was. I

(Testimony of Milton G. Strain.)

have read the above two pages and as far as I can recall, this statement is true and correct.

"M. G. STRAIN.

"Witness:

"J. R. ANDERSON."

Also the first page has the initials "JRA" and also the name "M. G. Strain." That is the statement which you made to Mr. Anderson; is that correct, Mr. Strain? A. It must be.

Q. Now, Mr. Strain, I am just going to ask you one more question. What is the custom as to the movement of cars when one of the members of the crew is outside of the view of the engineer?

A. Well, it is up to the foreman to protect him.

Q. It is up to the foreman to protect him?

A. Yes.

Q. Now, to the best of your recollection you have stated that you saw this man at the bull switch move towards the shanty? A. Yes.

Q. You don't know whether he was backing up or going forward [180] towards the shanty, do you?

A. No, I don't.

Q. And you don't know who that person was?

A. No.

Mr. Papas: Very well, that is all. No further questions.

Recross-Examination

By Mr. Cummins:

Q. I wonder if we might clarify something here in which we have a conflict, Mr. Strain. In your

(Testimony of Milton G. Strain.)

direct testimony you told us that just before the impact you were operating on an easy signal?

A. Yes.

Q. In the statement you say that you had not received an easy signal. Give us your best memory.

A. Well, what you mean by easy signal—you have got two different distinctions between your back-up signals. You have got a big back-up signal that is a little faster than your easy signal. If you have got a long ways to go he will give you a big back-up signal that is not violent, but just kind of a hurry-up motion; but if you have got a short ways to go, say about three, four, maybe five car lengths, well, it will be slower and easier, and you will know that you are not going to go very far.

Q. Well, there isn't any conflict, then?

A. An easy signal is when you get within a car length, maybe car and a half or two, that he raises his lantern up [181] straight and eases you into the cut.

Q. Then you were operating on an easy signal, but you didn't get another easy signal?

A. That is right.

Mr. Cummins: OK; that is all.

Mr. Papas: Your Honor, it is so close to the four o'clock period. We anticipated a doctor to be here this afternoon. However, he couldn't get here.

The Court: Do you wish to recess?

Mr. Papas: Yes.

The Court: Ladies and gentlemen, at the request of counsel we will adjourn until tomorrow morning

at ten o'clock. The same admonition to you not to discuss the case under any conditions or to form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until Wednesday, October 3, 1951, at 10:00 a.m.)

October 3, 1951—10:00 A.M.

The Clerk: Seamas vs. Atchison, Topeka & Santa Fe Railroad Company on trial.

Mr. Papas: May we proceed, your Honor.

The Court: Yes.

Mr. Papas: May we call Dr. McCloy?

DR. NEIL P. McCLOY

called as a witness on behalf of plaintiff, sworn:

The Clerk: Please state your name, your address, and your professional calling to the Court and to the Jury.

The Witness: My name is Neil P. McCloy, 1451 Masonic Avenue, San Francisco, and I am an orthopedic surgeon.

Direct Examination

By Mr. Papas:

Q. Dr. McCloy, would you be good enough, sir, to tell us where your offices are located?

A. 350 Post Street, San Francisco.

Q. Dr. McCloy, are you a duly licensed and practicing physician and surgeon in the State of California? A. Yes, sir.

Q. Would you be good enough to tell us how

(Testimony of Dr. Neil P. McCloy.)

long you have been admitted to the practice of medicine in the State of California?

Mr. Cummins: Counsel, if you will excuse me I will stipulate to the Doctor's qualifications as an orthopedist.

Mr. Papas: Thank you, Mr. Cummins. I think the Jury would [183] like to hear what his qualifications are, your Honor.

The Court: All right.

Q. (By Mr. Papas): Thank you. Dr. McCloy, you have graduated, sir, from what medical school or schools?

A. University of Southern California.

Q. When did you graduate, sir? A. 1938.

Q. When did you interne?

A. 1937 to 1938.

Q. Did you do your interning at the University of Southern California?

A. No, sir, it was done here in San Francisco.

Q. What hospital was that done in, sir?

A. Mary's Help Hospital, San Francisco.

Q. You stated that you had a specialty in medicine of orthopedic surgery?

A. That is correct, sir.

Q. Would you be good enough to tell us what does this specialty in orthopedic surgery consist of, Doctor?

A. It has to deal with all the diseases, injuries, deformities of the motor-skeleton system. That includes all the limbs, the arms, and the legs, the spine and the neck.

(Testimony of Dr. Neil P. McCloy.)

Q. Does that include the bones in the joints?

A. Precisely.

Q. Does it include the ligaments, the muscles and the tendons [184] that are connected to the bones and the joints?

A. It has to do with all the parts of the skeleton, both the bones and the joints, ligaments, and all the soft tissues and muscles, tendons and nerves that go along with it.

Q. Doctor, are you associated with any other orthopedic surgeons? A. Yes, sir.

Q. Would you be good enough to tell us, sir, who they are?

A. I am associated with Dr. Ralph Soto-Hall and and Dr. K. O. Haldeman of San Francisco, both orthopedists.

Q. Doctor, I take it that you are associated with hospitals? A. Yes, sir.

Q. Would you be good enough to tell us what hospitals are you associated with?

A. With the St. Joseph's hospital and the San Francisco Hospital.

Q. Both of them are located in the City and County of San Francisco? A. Yes, sir.

Q. And Dr. McCloy, did you examine Mr. Seamas at my request and at Mr. Michael's request?

A. I did.

Q. Do you recall, sir, when you first examined Mr. Seamas? A. On January 2, 1951.

Q. When did you examine him after that date, sir, if you can remember? [185]

(Testimony of Dr. Neil P. McCloy.)

A. Again on the 13th of June ,the 27th of August and the 27th of September, 1951.

Q. In other words, you examined him as late as last Thursday? A. Yes, sir.

Q. When you first examined Mr. Seamas, Doctor McCloy, did you take from him a history of the injuries that he was suffering from?

A. Yes, sir.

Q. Would you be good enough to tell us before we get into what that history is, what is the purpose of taking a history?

A. We take a history in order to determine the mechanism and the extent of the injury involved You have to know what happened to the man and how fast and how hard in order to get a good idea as to just how extensive the damage should be, and what type of injury would result from such a particular accident.

Q. And Dr. McCloy, I take it then that the taking of a history is a necessary part of your work in diagnosing a case? A. It is indispensable.

Q. Would you be good enough to tell us what history did Mr. Seamas give you of the injuries that he was complaining of?

A. He stated that in the course of his duties as switchman while working on top of a box car that he was knocked off and fell to the ground, landing on his feet, knees, and hands, thus suddenly doubling up, thus suddenly bending in the middle. He states that he had immediate pain in his mid low

(Testimony of Dr. Neil P. McCloy.)

back, [186] also some pain in the upper back and some weakness of the legs.

Q. And Doctor McCloy, I know that most of us are rather confused by some of the medical terms that you use in the human anatomy. Would you be good enough to tell us just what the vertebrae consists of in the human body?

A. If we can use the other side of the blackboard I could give a diagram.

Mr. Papas: Yes, thank you very much. May we, your Honor?

The Court: Yes.

The Witness: I will draw just a simple side view outline of one vertebrae. You will keep in mind, of course, that there are many of them and they are all stacked on top of each other like a stack of single blocks. (Witness draws diagram.)

This is just a simple side view of the vertebrae, very simple. This is the body of the vertebrae here (indicating). This is the part that comes out the back. It forms a joint with the other vertebrae, one above it, and one below it. There is another one right below, such as this (indicating). It is a very schematic—sketchy view of it in order to simplify it. Between the two vertebrae is a cushion right in here, soft cushion just like a shock absorber. It also acts as a hinge so that one vertebra can move a little bit against [187] the other. The rest of these processes that stick out of the vertebrae are all attachments for muscles that make the vertebrae move, also for ligaments that hold the vertebrae together.

(Testimony of Dr. Neil P. McCloy.)

Q. Dr. McCloy, I take it that we have some vertebrae in the neck area and in the upper back area and the lower part of the back, is that correct?

A. That is correct.

Q. What are the vertebrae in the upper portion of the body called?

A. The ones in the neck are called the cervical vertebrae which number seven. The ones through the center of the body and chest are the thoracic, roughly, twelve. The ones in the lower back are the lumbar vertebrae.

Q. Do we also have a portion of the human anatomy that is called the sacrum?

A. Yes, sir.

Q. What does that sacrum consist of?

A. The lower most portion of the spine excepting for the tail bone which is below that, but of little significance, and it consists of five or six vertebrae, but they are fused together. They do not have joints between them, and it forms the back of the pelvis, the back third of the pelvis.

Q. Dr. McCloy, you stated that you examined Mr. Seamas the first time on January 2, of [188] 1951? A. Yes.

Q. And would you be good enough to tell us, sir, just what did your examination reveal at that time?

A. It revealed that he had painful limitation of motion of his back. He also had acute tenderness over the lower portion of the back where the greatest portion of the injury was received.

(Testimony of Dr. Neil P. McCloy.)

Q. Do you recall whether or not there was any tenderness over the dorsal area?

A. Yes, there was some tenderness over the upper dorsal vertebrae region of the third dorsal and some in the region of the eighth dorsal vertebrae.

Q. Would you kindly point approximately where that region is, doctor?

A. The third is right below the neck (indicating). The eighth is just below your shoulder blades at a level right even with the tips of the shoulder blades.

Q. You stated that he had some tenderness over the third lumbar. Where is that located, sir?

A. The third lumbar is almost in the middle of your lower back. The fourth is your waist line, the third is just an inch above the—an inch above it or less.

Q. And Doctor, was Mr. Seamas suffering from pain at that time? A. Yes, sir. [189]

Q. Would you be good enough to tell us over what areas he was suffering this pain?

A. Mostly in the lower back at the junction of the lumbar spine and the sacrum. That is just below the belt line in the back.

Q. Did he complain of pain in the area of the legs? A. No, sir.

Q. Doctor, would you be good enough to tell us, is pain an objective or a subjective symptom of an injury?

(Testimony of Dr. Neil P. McCloy.)

A. The statement of the back that a man has pain can be both. You can state that it is subjective. The ordinary evidences that one uses to observe a person to see, for instance—for example, if a man going about the normal course of his business, his duties, is observed to suddenly wince or jump from a sudden motion that is fairly good objective evidence, so it could be both.

Q. How do you determine then the pain which he has, doctor? Do you use pressure?

A. You use pressure to determine tenderness. Pain on pressure or on pushing with the fingers is known as tenderness. Pain from the other standpoint is easily observed if you take a man's wrist for instance, and bend his wrist and he jumps and screams it is pretty good evidence he does have a pain.

Q. Would you be kind enough to tell us, is limitation of motion [190] an objective or subjective symptom of an injury?

A. That is definitely objective.

Q. Sir, how do you determine whether or not a person who claims he has been injured, that he has limitation of motion?

A. One, by comparison. For instance, you ask a man to bend over forward as far as he can, or to bend backward as far as he can, and then you ask him to do it again and assist him. If he bends more with assistance it is presumed that he is voluntarily restricting his motions a little bit. There are other means of testing whether a person is voluntarily restricting their motions. For instance, a man's for-

(Testimony of Dr. Neil P. McCloy.)

ward bending of the back, stooping, can first be tested by having him stand up and bend over. You may then measure the distance between the floor and his fingers. He may then be, when off his guard later on, tested in a sitting position. You can have him sit down with both legs outstretched on the table in a sitting position, and have him reach for his toes, again measure it. A man may then lie on his back, raise his legs up in the air, and reach for his toes with his fingers and again measure it. If the measurements are all approximately the same, and if you are reasonably certain that the man is not aware of the fact that you are testing a specific motion by different means, then it is good objective evidence that the man is not voluntarily restricting his motion.

Q. Dr. McCloy, with these tests that you spoke of—were [191] these tests that you spoke of used by you on Mr. Seamas? A. Yes, sir.

Q. And did you at that time conclude that his complaints were substantiated by his injuries?

A. Yes, I believe it was.

Q. By that you mean that they were real?

A. They were real.

Q. You had no reason to believe that he was voluntarily feigning a malingering?

Mr. Cummins: Objection——

The Court: Overruled.

A. By all the tests that we have and have used in this instance I found no evidence of voluntarily

(Testimony of Dr. Neil P. McCloy.)

attempting to deceive the examiner, no evidence of malingering.

Q. Doctor, on that first examination were you able at that time to determine what, if any, permanent disability you had sustained?

A. No, sir.

Q. Did you at that time request the privilege or the opportunity of examining him at a later date? A. I did, sir.

Q. Now, doctor, considering the type of injury that Mr. Seamas was complaining of, is traction a proper treatment for that type of injury?

A. Yes, sir, it is used very frequently. [192]

Q. What other means of treating that type of injury do you use, doctor?

A. Well, when first injured it is very acute and painful, they are treated by rest and by heat. This is gradually changed and the man is allowed more freedom and the rest in bed is replaced by the type of rest that you would get with a back support. For instance, adhesive tape, or a pelvic belt made of canvas, or if necessary even a brace made of metal. He is then taught to rehabilitate himself, and his back musculature by giving him special exercises to build up the muscles of his back and his trunk, abdomen, and then the support is gradually removed.

Q. Dr. McCloy, did you ask Mr. Seamas whether or not he was receiving this type of treatment?

A. Yes, sir.

Q. And what answer did he give you, sir?

(Testimony of Dr. Neil P. McCloy.)

Mr. Cummins: Objection. Hearsay and incompetent, if the Court please.

Mr. Papas: May I reframe the question, your Honor?

The Court: Yes.

Q. (By Mr. Papas): Do you know from your own knowledge what treatments he had received or was receiving, doctor? A. Yes.

Q. Would you tell us what those treatments were?

A. He received much the same thing that I just outlined in [193] answer to the previous question. In addition to that he also had massage and various types of heat therapy. He was given support with a canvas at first and then later was given a metal back brace to wear. He last received treatment in July, 1951.

Q. Did you at that time instruct him to continue these treatments?

A. There was no specific instruction given.

Q. You stated that he was using a back brace?

A. Yes, sir.

Q. Would you tell us what that back brace was, doctor?

A. It is a metal brace, something like a woman's corset. The garment gets a grip around the pelvis for a foundation, and it has two up-riggers in the back to which is attached a belt that goes around the abdomen and round the lower portion of the chest so that it is a corset actually that is anchored

(Testimony of Dr. Neil P. McCloy.)

to the pelvis by a rather firm belt. It prevents motion of the lower back.

Q. Doctor, when you first examined him was he using a cane? A. Yes, sir.

Q. And does a cane help steady a person's walking who has those types of injuries?

Mr. Cummins: Objection to that——

Mr. Papas: I will reframe the question, your Honor. I will comply with your request, Mr. [194] Cummins.

Q. (By Mr. Papas): What is the purpose of using a cane, doctor?

A. A cane ordinarily is used for an aid in walking. That is, either organic weakness or pain, or some difficulty with one's limbs.

Q. Do you recall, doctor, whether or not he was using crutches when you first saw Mr. Seamas?

A. I do not recall.

Q. I see. Now, you stated that you next saw him on June 13th of 1951? A. Yes, sir.

Q. And was the same or similar type of examination given to Mr. Seamas? A. Yes, sir.

Q. And did he have the restriction of motion of which you spoke at that time?

A. In June of 1951, the patient was objectively worse. He also had more complaints than he did on the first examination, and in general I felt that he was definitely worse at that time. On the first examination in January of 1951, he had no muscle spasm in his back that I could find and was defi-

(Testimony of Dr. Neil P. McCloy.)

nitely present in June. His restriction was slightly increased at that time.

Q. Excuse me, sir.

A. He appeared to be having more pain than he had previously.

Q. Were the same tests used to determine whether or not the [195] restriction of motion and the pain that he was suffering from were real?

A. Yes, the same type of tests were used.

Q. Doctor, may I ask on the first examination of Mr. Seamas by you, did you or anyone under your supervision take any X-rays of Mr. Seamas?

A. Yes, sir, I did.

Q. And did you take any X-rays on the second examination? A. Yes, sir.

Q. Now doctor, you stated that you then saw Mr. Seamas at some time in August, wasn't it?

A. August 27, 1951.

Q. And was the same type of examination given to Mr. Seamas? A. Yes, sir.

Q. And what were your findings on that examination?

A. I felt that he was definitely improved in August.

Q. He had improved? A. Yes.

Q. Was he still wearing the back brace?

A. Yes.

Q. Did you at that time take X-rays of his back area? A. Yes.

Q. And during this third examination, doctor, did you test his lifting power?

(Testimony of Dr. Neil P. McCloy.)

A. No, I did not test it. I questioned the man about his lifting [196] power and he felt he could lift about 25 to 30 pounds, maximum.

Q. Dr. McCloy, did you take X-rays on the third examination?

A. There were three sets of X-rays taken.

Q. Three sets of X-rays?

A. The last ones, I believe, August 27, 1951.

Q. I have these X-rays, doctor. Would you be good enough to check them over to see if these are the X-rays which you took of Mr. Seamas?

A. Yes, sir. Do you wish me to demonstrate these X-rays?

Mr. Cummins: Your Honor, I don't wish to make any objection to the X-rays. I am satisfied if the doctor says they are the X-rays of Mr. Seamas, that they are; but I would like to know if the doctor has any notes of the X-ray technician, unless he took the X-rays himself, and if I might see those and the doctor's notes, if he is testifying from notes or from memory.

A. I have not attempted to testify from notes.

Mr. Cummins: Have you refreshed your memory from notes, doctor?

A. Yes, I have.

Mr. Cummins: Do you have those notes with you?

A. I have.

Mr. Cummins: May I see them?

A. You are welcome to them.

Mr. Cummins: Do you have any X-ray reports?

(Testimony of Dr. Neil P. McCloy.)

A. We have no X-ray reports available.

Mr. Cummins: Did you receive X-ray [197] reports?

A. Yes.

Mr. Cummins: But you didn't bring them to court, doctor?

A. No, but they are available if you are interested in them.

Q. (By Mr. Papas): Are you able to identify those X-rays, doctor?

Q. Are all of those X-rays X-rays of Mr. Seamas' back? A. Yes, sir.

Q. Were they taken under your supervision and at your request?

A. They were taken at my request.

Mr. Papas: May I have those marked, your Honor?

The Court: Yes.

Mr. Papas: Have them marked for identification, your Honor.

(X-ray films were marked Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Papas): Doctor, just pick out the X-rays which you feel best show the injury which Mr. Seamas complains of, if you will.

A. I think it is best to show the originals and the last ones.

Q. Well, would you be good enough to pick out the X-rays which you feel best bring out the injuries which Mr. Seamas complained of? [198]

(Testimony of Neil P. McCloy.)

A. The injury which Mr. Seamas complained of is an injury to the soft tissues, and the tissues have no calcium in them and they therefore do not show or throw a shadow on the X-ray. I will show you a picture of the area where his major complaints are, and also an area where some of his minor complaints were.

This is just a side view of the spine. This is taken in January. This accident was in December of 1950. This is approximately a little less than a month later. The only thing of real interest in these films—in this film, is what appears to be a very minor, small compression fracture of the front of the third lumbar vertebral body. This I know you can't see from where you are. It is a very small thing. It looks like some slight bending over of the front lip of the vertebrae there.

That is only important from the standpoint of determining the mechanism and the force that caused the injury. It has not proved to be important in itself. The patient was tender over this area until August of 1951, at which time his tenderness diminished markedly. His main injuries to his back are soft tissue injuries and injuries of the joints of the lower back.

Q. Those are not visible by X-ray, are they?

A. The actual injury itself is not visible in the X-ray.

Q. When was that film taken, sir?

A. January 2nd. No, I am sorry, this is June—

(Testimony of Neil P. McCloy.)

June 13, 1951. [199] It may be a little more clear in the original films.

This is one of the original films. I think now you can see it. It is a little more clear. You can see this slight line that runs through there and a slight compression of the front of the vertebrae as compared to the rest of them. This is smooth here (indicating on X-ray.) This is smooth here. Smooth here. Right here there is a slight mushrooming of the upper lip of the vertebrae.

Q. Thank you. Are you through with that X-ray, doctor? A. Yes.

Mr. Papas: May I have that marked in evidence, your Honor?

The Court: So ordered.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

A. Later X-rays were taken to determine whether or not this was truly a fracture. Whether it had been a fracture or not could ordinarily have been determined by two things: Either new bone formation would be present to show that there was a fracture originally or the actual line of compression would have changed in density. It might have either dissappeared or partially disappeared.

In this film of August 27, 1951, there had been a slight change, and it has become more smooth and the line of density—the line of fracture, which we originally felt was fracture, [200] has changed in density. This is not, as you would say in the vernacu-

(Testimony of Neil P. McCloy.)

lar, flat-footed evidence of healing, but it is good evidence.

Q. Are you through with that, Doctor?

A. Yes.

Mr. Papas: May we admit this in evidence, your Honor, as Plaintiff's Exhibit next in order.

The Court: So ordered.

(The X-ray of August 27, 1951, was admitted into evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Papas): Do you have any other X-rays, doctor, that would show any changes that have taken place since the date of the injury in that lumbar area?

A. No, there have been no other changes except those that I have spoken of.

Q. Would you be seated, please.

(Witness resumes witness stand.)

Q. Dr. McCloy, can you tell us whether or not there was any derangement of the intervertebral disc between the lumbar region and the sacrum?

A. In speaking of his injuries being mostly soft tissue injuries, I included in that the joints of the spine, the ligaments around the joints, and the rest of the soft tissue structure such as the intervertebral disc or cushion which I pointed out exists between two vertebrae. [201]

This structure is particularly vulnerable to falls where a person lands on their feet or knees and

(Testimony of Neil P. McCloy.)

gives the spine an upward thrust; or when the back is bent too far forward or too far backward. And I feel that, with the amount of tenderness and restriction of motion, especially since the restriction of motion is one-sided so far as lateral bending of the back is concerned, that is, bending from right to left, that this structure is one of the soft tissue structures about the lower back that has been damaged by his accident.

Q. Doctor, this is what you term an intervertebral disc? (Indicating on diagram on blackboard.)

A. Yes, that is the disc or cushion that exists between two vertebrae. This actually is a soft cushion.

Q. And the purpose of that, doctor, is what?

A. To act as a shock absorber. For instance, if you were to walk down a hard sidewalk without a shock absorber between the vertebrae the actual shock of your foot hitting a hard object would be immediately transmitted by bone to your head and the vibration would be excessive. Not only that, but it also acts as something of a hinge to assist in motion between the vertebrae.

Q. Doctor, did you feel that he has a protrusion or herniation of that intervertebral disc of which you speak?

Mr. Cummins: I object to the form of the question, your Honor. [202]

Mr. Papas: I will reframe it, your Honor.

Q. Dr. McCloy, did you come to any opinion or

(Testimony of Neil P. McCloy.)

conclusion as to whether or not there was any herniation or protrusion of that intervertebral disc?

A. No, sir.

Q. Did you come to any opinion and conclusion as to whether or not there was any derangement?

A. Yes, sir.

Q. Of the intervertebral disc? A. Yes, sir.

Q. Doctor, is it probable that at a later date, after this derangement had taken place, that the intervertebral disc may herniate or protrude?

Mr. Cummins: I object to the form of the question.

The Court: Sustained.

Q. (By Mr. Papas): Dr. McCloy, would you be good enough to tell us what the significance is of these changes that have taken place as you showed us in the X-ray films of the third lumbar vertebrae?

A. The significance of that is not that the fracture itself is important, because the man apparently is recovering from any injury to the area without any difficulty. It is merely an index to allow you to know how much force was used in the production of the injury.

If I might give an example, for instance, if one were to [203] violently twist an ankle two things have to happen: Either you have to tear the ligaments, or the bone has to break. It is very rare that they both happen at the same time. In a young person who has strong bones the bones don't break; the ligaments tear and you get a sprained ankle. If you are an older person and have relative weaker

(Testimony of Neil P. McCloy.)

bones the ligaments hold and you break your ankle.

Also herein, thinking of this problem, this man apparently had an injury sufficient to produce a small fracture. The bone did not give very much, and we then argue from that that his soft tissues did give a great deal. And that is apparently borne out by the man's examination and his subsequent progress.

Q. Dr. McCloy, after having examined him on four occasions, have you reached an opinion or conclusion as to what the diagnosis of his injuries are?

A. The actual diagnosis is, No. 1, an acute bending sprain of the lower back about the lumbar-sacral joint, the junction of the lumbar spine and the sacrum. This includes tearing of the ligaments about this joint and damage to his intervertebral disc; No. 2, a slight compression fracture of the third lumbar vertebrae.

Q. Doctor, a person suffering from this type of injury, do they get any relief by sleeping on a hard surface such as a floor or a hard bed? [204]

A. Yes, sir, they often do.

Q. Dr. McCloy, have you reached an opinion as to whether or not the injuries which Mr. Seamas has suffered are permanent?

A. Mr. Seamas has sustained some permanent injuries, which will consist of pain in his lower back on extremes of motion, and approximately 20 to 25 degrees restriction of the motions of forward and backward bending, and bending to the right,

(Testimony of Neil P. McCloy.)

together with some weakness of the back, and pain in the back on hard use.

Q. And, Doctor McCloy, you knew of course that he was a switchman for the Santa Fe Railroad Company? A. Yes, sir.

Q. And do you feel that he will be able to carry on his duties as a switchman in the future?

A. I think it may be possible in a year or two, but I rather feel it would be improbable because——

Q. Do you feel——

A. Pardon me. ——because of the nature of the work, which requires a great deal of climbing and agility.

Q. Do you feel he would be better off by doing lighter work? A. Yes, I do.

Q. Doctor, I take it that the medical profession more or less stereotypes the injuries which a person has as slight, moderate or severe?

A. Yes. [205]

Q. Will you be good enough, if you can, sir, to classify the injuries which he has sustained?

A. I think any injury which produces permanent changes and permanent disability can readily be classified as severe.

Q. Now, Doctor, earlier you stated that there is a probability that the intervertebral disc in the lumbar-sacral area may in the future protrude or herniate. Would any surgery afford him relief?

Mr. Cummins: Objected to. There is no such evidence in this case at all. The question is leading

(Testimony of Neil P. McCloy.)

and suggestive, and it cites what purport to be facts that are not in this record.

The Court: Could the Doctor in his own words tell us about the disc derangement?

A. Yes, sir.

The Court: You characterized it as derangement?

A. Yes.

The Court: First, will you define "derangement," then, if it be a fact that there is a prospect, reasonable in nature, of a herniated disc, will you indicate in line of time element when that might occur, if it does occur?

A. All right. The derangement—the definition of "derangement," used in this particular sense or this particular area, is any disturbance of the function of the disc, such as tearing of the ligaments that hold the disc in place; over [206] stretching of the ligaments that hold the disc in place; sudden violent compression of the disc that may crack the cartilage plates, which are flat, smooth, shiny faces of the vertebrae, thus allowing the central disc material of the vertebrae——

Mr. Cummins: Excuse me, Doctor. I object to this unless it is confined to this patient, reasonable medical certainty with respect to this patient, the Doctor's conclusion with respect to reasonable certainty and not an exposition of what a disc may be.

The Court: We have to understand what a disc is, and the jurors do, and I will overrule the objection.

(Testimony of Neil P. McCloy.)

A. If I may demonstrate, to simplify this.

(Witness leaves witness stand and goes to blackboard.)

A. (Continued): The actual center of a disc is almost liquid. It is a semi-solid, comes out as liquid, a fairly thick liquid. When you bend your vertebrae this way, bringing the two faces together like that in front, that semi-solid or liquid center moves to the back just like a bubble in a level.

When this disc is damaged by sudden pressure, these two blocks of the vertebrae—say the one on your right is the normal disc, this disc material in here, which is semi-solid liquid or liquid center, these lines on the outside of the disc being the ligaments that hold the disc to the [207] vertebrae. If they are suddenly jammed together as from a fall and the two vertebrae approach each other like this, the ligaments shorten. The liquid is in the center like that. Liquid is not compressible like air, so that it will force these ligaments out like that, making a bulge, may cause them to tear.

An actual compression or injury might drive this liquid out through the various portions of the disc, disrupt the architecture of the disc, and on rare occasions it may be so violent as to drive them right up into the bone of the vertebrae. That is what is known, as simply as I can explain it, as derangement of the disc, without actually breaking the disc right through the ligament, which is known as a herniation or rupture of the disc.

(Testimony of Neil P. McCloy.)

If the compression force is so violent as to drive the liquid content or disc out to the ligaments into the posterior portion, back portion of the neuro canal, which runs through here, that is known as a herniated disc. I am not speaking about a herniated disc, but merely of damage to the intact disc that has not herniated.

(Witness resumes witness stand.)

A. (Continuing): I feel this, that this man had sufficient injury in the first place to have a derangement to the disc by the nature of his fall from a height on to his feet, followed by violent pain in his lower back, together with the [208] fact that he has had continuing tenderness and restriction of motion ever since that time. He also has had concomitant injury to the ligaments about this particular joint.

As to whether or not this disc may herniate in the future, I cannot prophesy whether or not it will herniate, and I am not certain whether the possibility of it occurring in him would be any greater than in any other person of the same type of build.

Q. (By Mr. Papas): Dr. McCloy, just one more question: Assuming that a person of Mr. Seamas' physical makeup and his age was standing at or near a brake platform of a railroad boxcar, approximately ten or twelve feet above the level of the ground; that he was by some violent jar knocked to the ground and, on falling, he fell in

(Testimony of Neil P. McCloy.)

a jackknife position on his knees and on the palms of his hands. Would that type of fall cause the injury of which Mr. Seamas complains?

A. Yes.

Mr. Papas: You may cross-examine.

The Court: We might take the morning recess, if convenient.

The same admonition to you, ladies and gentlemen of the jury, not to discuss this case under any conditions or circumstances and not to form or express an opinion until the case is submitted to you.

(Thereupon a short recess was taken.) [209]

Cross-Examination

By Mr. Cummins:

Q. Doctor McCloy, did you give Mr. Seamas any treatment yourself?

A. No specific treatment other than some advice such as in one instance to discard his cane, and on another some special exercises to begin.

Q. It was your thought that he shouldn't use the cane? A. That is correct, yes, sir.

Q. You told us that using a cane was a good thing for people in some circumstances, but in this particular instance it wouldn't be your medical opinion that this man should use a cane or should have used a cane; is that it?

A. That is correct.

Q. Now, at whose instance, or how did you happen to see Mr. Seamas first on January 2, 1951?

(Testimony of Neil P. McCloy.)

A. I was requested by his attorney, Mr. Michael, to examine the patient.

Q. That was approximately three weeks after this accident took place that you first saw him?

A. Yes, sir.

Q. And you didn't see him again until June?

A. That is correct.

Q. You mentioned during the direct examination that the history the patient gives you is indispensable to you in arriving at a diagnosis, and you told us something as to [210] why it is indispensable. May I ask this, Doctor, that if the history that the patient gives you is not accurate does that have any bearing or effect on your ability to correctly diagnose the case?

A. Yes, it could have, certainly.

Q. I am wondering if Mr. Seamas told you whether or not he worked after he fell?

A. I do not recall that, sir.

Q. Would it be important to you to know whether or not he worked after he fell?

A. Not necessarily.

Q. If he climbed on a boxcar and set a hand brake would that have any bearing upon the degree of injury? Would it be one fact of the facts that would be of value to you in determining the degree of injury?

A. That question cannot be answered yes or no, but I may attempt to answer it by explanation.

Q. Please do, sir.

A. People may have very severe injuries and in

(Testimony of Neil P. McCloy.)

the course of duty or because of necessity can readily perform certain almost unbelievable actions immediately after the injury because there is a type of anesthesia that occurs after serious injury. By way of example, the patient may walk down the street, step off a curb and sprain their ankle very severely. They may even dislocate their ankle. In attempting to [211] cross the street they may be in jeopardy of their life. I can assure you that the patient can usually run out of the way of the automobile or the street car with apparent ease and not in pain. Pain appears somewhat later after injury. Sometimes it may appear immediately, but if the nerves are damaged then pain does not always appear right away.

Q. Didn't Mr. Seamas tell you he was in pain right away? A. Yes, he did.

Q. Of course, under the battlefield conditions a person may have a wound and because of the emergency nature of the circumstances he may not become conscious of pain. That is the sort of thing you have told us about, isn't it?

A. No, sir, it is a physical thing. It is not entirely mental.

Q. But in a yard, a railroad yard where there is no evidence thus far of anybody being in any rush or hurry, that pain would become conscious a little quicker generally, wouldn't it?

A. I am not acquainted with the urgency of the situation at the time.

Q. Well, I want you to assume, in view of the

(Testimony of Neil P. McCloy.)

record in this case, that there isn't any evidence of any urgency; what would be the answer under those circumstances?

A. The man could very easily have immediate pain; very easily. That is the more usual thing. Extensive anesthesia is far [212] less usual.

Q. Now, doctor, you have told us that pain is a subjective symptom. You have to depend as a doctor, to some extent at least, upon the patient's accuracy in telling you how he feels when you press on a given spot. He says that hurts, don't you?

A. To a certain extent only.

Q. Then, as far as limitation of motion is concerned, if you tell me to bend forward as far as I can bend, I may bend this far (indicating), or if you are not looking I might even get over and tie my shoe, but isn't this true, Doctor, that the interpretative process, you as a physician are on some test and your accuracy is a very important feature in interpreting just how much of that patient's loss of motion is real and how much is not real, isn't that correct?

A. That is correct. That is why we use far more than one test. In order to cross-check ourselves to make sure that we are not being deluded.

Q. Even after cross-checking you sometimes make an error, don't you?

A. Being human, always.

Q. Would you say that Mr. Seamas is in any degree suggestible?

(Testimony of Neil P. McCloy.)

Mr. Papas: Excuse me, your Honor. That is a very vague term to use. I——

The Court: Overruled. [213]

A. Do you wish me to answer, sir?

Q. (By Mr. Cummins): Please, sir.

A. I would also like to answer that question, "Yes," with explanation. Mr. Seamas has a definite type of personality, just like everyone else does. I have not found him to be suggestible and have not voluntarily or willingly tried to suggest anything to him in order that I may act as a——

Q. Please, Doctor, I didn't mean that you would have suggested anything. I am not throwing any aspersions at you.

A. No, I know. I understand that. I do not wish to give that impression either. I try to remain as an independent and very impartial examiner throughout and to examine him on more than one occasion so that I may acquire an estimate of his whole personality. After all, it is not the back that is injured, it is the man that is injured.

Q. Doctor, I notice in your note here—you don't write any better than we lawyers—I am going to ask you to read it.

"Apprehension"—I can make that word out. Would you read the rest of the sentence?

A. All right, it says, "Apprehension—Further exam apparently normal for this patient." In other words, on further examination it appears to be normal for him.

"Must consider the patient and not the back."

(Testimony of Neil P. McCloy.)

Q. What did you mean by that?

A. In—may I ask you to be more specific in your question, [214] please?

Q. What did you mean by your note, "You must consider the patient, not the back."?

A. Whenever you treat a patient for a disease or an injury or a deformity you have to treat the patient, not their deformity. You have to consider the patient as a whole. I can give you a little example, if you wish. For instance, the correction of deformity during the growth period. In making any change in the dynamics of a child's—a growing child's limbs, you have to take growth into consideration, and you have to visualize the patient twenty years hence and not just for the next few months.

Q. All right, doctor. When you showed us the X-rays that you showed us you told us there was a compression fracture of the third lumbar vertebra, is that correct? A. Yes, sir.

Q. That is your opinion, that there was a compression fracture? A. That is my opinion.

Q. How old was that fracture, doctor?

A. We have no objective evidence of its age prior to the X-rays taken in January of 1951, other than that it appeared to have all the findings of a recent fracture. There was no evidence of healing. There were no defects in the adjacent vertebrae of the same type and it looks like it may have been a [215] slight wedging of the vertebrae.

Q. It is of considerable importance to you, doc-

(Testimony of Dr. Neil P. McCloy.)

tor, in determining the nature and the amount of force sustained by Mr. Seamas, that fracture, isn't it?

A. No, it is only part of the knowledge that is required to come to that conclusion.

Q. It is one of the facets?

A. Just one of the things. We certainly will not go on just one finding alone.

Q. It is important to determine the mechanism and the causes of the injury?

A. It is a factor.

Q. And the degree of injury?

A. That is correct.

Mr. Cummins: Would you step down to the box, please, Doctor? May we have the light?

(Witness complies.)

Q. (By Mr. Cummins): Do you see that compression fracture in this X-ray, doctor—without looking at the date, please, doctor?

A. I won't look at the date. I wish to determine if it was supposed to be a picture of Mr. Seamas?

Q. It is Mr. Seamas' back, I assure you. Just look at the X-ray and tell me if you see the compression fracture?

A. Yes, I see the same thing to a certain extent right here (indicating). [216]

Q. Now look at the date, doctor.

A. The date on the film is marked September 5, 1939.

Q. Yes.

(Testimony of Dr. Neil P. McCloy.)

A. We, of course, have had no access to the films of this age.

Q. May I apologize to you now for bringing it up in this way, but as it is a duty to my client, and I feel that it is necessary to point out dramatically to this jury that this picture shows the same thing as in the later X-rays. I am sorry that I did that to you.

A. I have no other interest in the film other than I am very happy to see it because in the interests of honesty, to say nothing of my own curiosity, I am much relieved to have the mystery opened up.

The Court: Doctor, may I ask you to point out that fracture? I was seated on the bench at the time.

The Witness: There is a slight mushrooming of the forward lip of that vertebrae right there (indicating), as compared to some of the others. It may or may not have been due to injury.

The Court: That is the same fracture which apparently is projected in the later X-rays?

A. That is very similar to what is found in later films.

The Court: Is it the same, doctor, would you say?

A. I would say it is probably the same. 4/5/43. It is most likely the same, although I can't count the vertebrae accurately. [217]

Mr. Cummins: Would you like to compare them, doctor? I will give you the other X-ray.

The Court: Pardon me, doctor. Merely for the edification of the jurors and the Court, who are not skilled in matters of medical science, wouldn't a

(Testimony of Dr. Neil P. McCloy.)

fracture reflected as of 1939, that is, as to date, show a healing process as of the present date and not be reflected in the X-ray at all?

A. Depending on how much deformity had occurred in the original injury.

The Court: I see.

A. If there was considerable squashing of the vertebrae, it would be there permanently; would be very little change over a period of years and might become worse.

The Court: But the fracture line would reflect itself by recent pictures?

A. From a squashed injury actually?

The Court: Yes.

A. Ordinarily, no. There would be other changes that would be more significant than an actual line. These films of October 3, 1951, show the same thing to a slightly greater degree. It may, however only be due to the magnification in the actual X-ray set-up that took the films. The magnification depends on the distance of the tube to the person. It may have been closer here than it was here, and everything looks bigger in this picture than in this picture. They look very similar. [218] If I might add, this originally was questioned by the specialist in radiology as either a possible spur or a fracture. At a later date we felt there was a possibility of a fracture. However, this has been thrown out in the case of the older film which shows a very similar defect.

(Testimony of Dr. Neil P. McCloy.)

Mr. Cummins: Thank you, doctor.

A. I don't believe it detracts——

Mr. Cummins: May I have this marked in evidence as next in order?

The Court: So ordered.

(An X-ray was received in evidence and marked Defendant's Exhibit C.)

The Court: You were about to finish an answer, doctor, when you were interrupted. You said you did not believe that it detracts. Will you complete that answer?

A. I did not believe that detracts from the objective and subjective evidence of the kind of injury at the present time.

Mr. Cummins: Your Honor, I am going to ask that that remark be stricken out, because that is what this jury is to determine, and it therefore is incompetent.

The Court: Well, I think it would be a subject matter of expert testimony. I will disallow the motion.

Q. (By Mr. Cummins): Doctor, do I understand you to state, then, that it is of no importance now whether or not there was a compression fracture of sufficient force and direction of [219] blow to constitute a compression fracture?

A. As I answered a previous question, that was only one part of the examination and only one facet of the necessary factors that one has to get together to make a conclusion.

(Testimony of Neil P. McCloy.)

Q. Very well, doctor.

A. There are others.

Q. Have you ever been informed that Mr. Seamas suffered a nervous breakdown in 1947?

A. That is correct.

Q. Don't you think that at least part of this so-called disability is due to his mental attitude toward his condition and not to anything that objectively happened to his back?

A. The answer to that, sir, is that his mental attitude toward his condition only appeared after his injury. He did not have the mental attitude toward his condition before the injury, and I do therefore feel that his mental attitude and his apprehension and anxiety is the result of his injury.

Q. Do you think that after this case is over his mental attitude might get somewhat better and his condition might improve? A. I doubt it.

Q. Have you seen cases where after the case was settled, or the case was over, that the patient with a mental attitude about his condition would improve?

A. To my own personal experience, I have seen very, very few as [220] you describe.

Q. You do——

A. (Interposing): It does happen.

Q. You do say that you see in this patient evidence of apprehension? A. That is correct.

Q. And an ironic element of the thinking of the patient about his own condition which contributes to his current disability, isn't that correct?

(Testimony of Neil P. McCloy.)

A. I see in this patient apprehension, which is anxiety or fear for the future, or fear of being hurt, either on movement or on examination, which is a normal reaction to this particular man. It happens for this particular man that is the normal reaction. After all, this man was hired this way. The man was given a job for himself as he is, and as he was.

Q. Didn't it give you a little difficulty, as far as a doctor, to determine how much of his inability to move backward or forward or to one side or the other was voluntary and how much of that is involuntary?

A. It is difficult, but then there are means of determining that within reason.

Q. When you have a patient whose thinking about himself contributes to his disability, it becomes even more difficult to determine with any accuracy what his real disability is, doesn't it? [221]

A. Depends on the actual severity of that apprehension, which in this case I would consider to be moderate and not extreme or severe.

Q. Moderate instead of severe now, is that right?

A. His apprehension, not his injury.

Q. Let me ask you about these X-rays that you have taken—these drawings that you have taken. Do you see any objective signs of any injury in X-rays now?

A. As I answered a previous question to that this morning, sir, there is no evidence—there is no objective evidence of injury in the X-ray itself, which is only a shadow picture, after all.

(Testimony of Dr. Neil P. McCloy.)

Q. You told us this, that you have in your opinion a soft tissue injury, an injury that possibly compressed and deranged a disc and tore the tendons?

A. No, sir. The ligaments.

Q. The ligaments. That is your opinion, is that correct? A. Yes, sir.

Q. That is based upon all the things you told us about, including some evidence as to what you thought of as a compression fracture?

A. That is true, sir.

Q. Doctor, soft tissue, to use the medical terminology, is fascia ligamentus, skin, veins, nerves, everything but bones, isn't it? [222]

A. That is correct.

Q. Wouldn't you normally expect a much quicker healing of this man for his mental attitude?

A. I would like to answer that by way of explanation. I believe that his personality will prolong his disability to a certain extent. Not to a major extent, but just—well, to make it more clear, let's say approximately it might make his disability 20 to 25 per cent longer. But then this apprehension and the necessity for prolonged disability didn't exist before accident. It only occurred after accident and is directly or indirectly the result of the accident.

Q. Let's come back to the suggestibility, doctor. If a person is examined by many doctors and contacted, talked to by many lawyers, there is at least a possibility he can begin to feel sorry for himself, isn't there? A. That is a possibility.

(Testimony of Dr. Neil P. McCloy.)

Q. And if there is some chance of a reward, that may enter the picture?

A. That is a possibility.

Q. And it may enter it on an involuntary basis or a voluntary basis? A. That is true.

Q. In other words—I live in a glass house; I don't throw stones at anybody—it is entirely possible for Mr. Seamas to honestly have a feeling that he is injured because of [223] suggestibility, because of these numerous medical examinations and because of the lawsuit pending, isn't that true?

A. Not in his case as I examined him before he was seen by many doctors and many lawyers.

Q. When you first saw him he had no muscle spasm in his back? A. That is correct.

Q. The muscles were not tense around his spine?

A. He had no muscle spasm.

Q. And he had no splinting in the back by stiff muscles when you first saw him in January, 1950, isn't that true?

A. That is not a frequent finding in the presence of injury. It does occur, but it isn't always present.

Q. It wasn't present in this case?

A. I was not present in this case.

Q. But it was six months later?

A. That is true.

Q. When a man—let's say myself. I am convinced I have an injury to my back, and I hold it as stiff as a poker for six months, I will have muscle spasm, won't I?

A. You will have voluntary contracture of

(Testimony of Dr. Neil P. McCloy.)

muscles. You probably will not have what is known as true involuntary muscle splinting.

Q. That is absolutely true. Won't have an involuntary muscle splinting thereby, but brought on by my own involuntary action [224] by holding my spine stiff? A. That is correct.

Q. But it will be difficult for you as a doctor to tell whether it is voluntary or involuntary?

A. So that you have to depend on other findings.

Q. Yes. You found him improved in August?

A. Yes.

Q. And in September? A. Yes.

Q. Do you think there is a herniated disc in this case? A. No, sir.

Q. Would you operate on him? A. No, sir.

Q. Feeling there is a 25 per cent disability in this case, why wouldn't you operate and fuse his spine so that there won't be any disability?

A. I don't think it is indicated.

The Court: What was that last question, Mr. Cummins?

Mr. Cummins: Will you read the question, Mr. Reporter?

(Question read by Reporter.)

The Court: Doctor, what was your answer?

A. I do not think an operation is indicated at this time, or at any time, from my opinion at this moment.

Q. (By Mr. Cummins): Could you remove disability by an operation in this case? [225]

(Testimony of Dr. Neil P. McCloy.)

A. No, sir, I do not believe so.

Q. Is it possible in some cases where you have that back injury to relieve disabililty by a fusion operation? A. Yes, sir.

The Court: What is a fusion operation, for the jury? I happen to know, doctor, but the jurors possibly do not.

A. A fusion operation is where you actually grow two vertebrae together by means of a bone graft in order to stop motion of that particular joint.

Q. (By Mr. Cummins): Doctor, do you feel that Mr. Seamans could do passenger work, like a brakeman? He has worked as a brakeman. He has done some work as a brakeman. Do you think he could ride the passenger trains?

A. Not at the present time.

Q. Do you think he will ever be able to?

A. I think it is possible, but improbable.

Q. Now, I want to ask you about a disc and the prognosis as to possibility of a disc.

A. Pardon me? Possibility of what?

Q. Your prognosis as to possibility of a disc.

A. Oh.

Q. I believe you told us you didn't feel Mr. Seamas was any more likely to have a herniated disc than anybody else of his shape and build, is that correct? A. That is correct. [226]

Q. You don't feel any operation for a disc is going to be neccessary? A. I do not think so.

Q. That means, then, that there is no narrowing of the space between the vertebrae?

(Testimony of Dr. Neil P. McCloy.)

A. Yes, he does have.

Q. But you still feel it does not indicate a herniated disc? A. No, sir.

Q. He has a congenital defect between the first sacral and the fifth lumbar? A. Yes.

Q. And a congenital defect, for the benefit of the jury, means he has had it all his life, and he was born with it. A. Correct.

Q. There has been no change in reflexes indicating any impairment to any of the nerves emanating from this man's back? A. No, sir.

Q. No sensory changes indicating any such impairment? A. No, sir.

Q. You have taken no pantopaque tests?

A. No, I didn't feel it would be indicated in the absence of reflex changes.

The Court: Pardon this interruption, Mr. Cummins, but [227] that is another technical term that might be explained to the jury.

A. A pantopaque test consists of determination by a radio opaque dye, a dye that will cast a shadow. It is a liquid dye that will cast a shadow on an X-ray plate when you ray it with X-ray, so that it can be put into a cavity inside of soft tissue, and when you take an X-ray it will show up the dye in the cavity. Pantopaque tests, determining types and kinds of injuries and diseases of the intervertebral discs, is put in the spinal canal around the nerve and it will cast a shadow of a bulging disc and show a difference in the shadow if the disc is bulging.

Q. (By Mr. Cummins): Thank you, doctor.

(Testimony of Dr. Neil P. McCloy.)

Now, so that we may be absolutely clear, is it correct to state—am I correct in saying that in so far as a ruptured disc that you have described here in the board, or a herniated disc, meaning the same thing, is concerned—— A. Yes.

Q. There is no evidence of that in this case?

A. There is no external evidence of it.

Q. What this case comes down to, then, in your opinion, is a soft tissue injury?

A. If you will accept my definition and include in that the intervertebral disc.

Q. Yes, I am accepting your definition. [228]

A. Yes, sir.

Q. Doctor, when you have a sprain of an akle, what is normal healing when you have a soft tissue injury, as a sprain of an ankle?

A. Your example will not cover the definition, because you have to include in it, if we may repeat ourselves, speaking of soft tissue injury of the lower back, I wish to include the ligaments and the muscles, the intervertebral discs, the joint surfaces, the cartilage on the joints, and the bone, and the lining of the joints. So that your example does not quite cover the ground.

In speaking of a sprained ankle, one seldom injures the lining of the joint. You merely force the joint open and tear the ligament that holds the joint together, and also the lining and covering of the joint, known as the joint capsule. If it is a mild sprain or only a few fibers or ligaments are torn,

(Testimony of Neil P. McCloy.)

which we will now define as the ordinary sprained ankle, the average healing time is approximately—well, let me define average healing time. The time that a person would actually go back to work and be free of pain—that would be approximately five weeks for that. A serious sprain of the ankle, that is a different problem.

Q. Doctor, does Mr. Seamas have muscle spasm in his back now? A. I don't know, sir.

Q. Did he have, on September 27th, when you last saw him? [229] A. No, sir.

Mr. Cummins: Thank you, doctor. That is all.

The Court: Counsel would like to ask you another question, doctor.

Mr. Papas: I just have one or two more questions, doctor.

Redirect Examination

By Mr. Papas:

Q. Doctor, I remember you stated that the small compression fracture which you mentioned to us on that X-ray machine was of minimal significance, is that correct? A. That is right. In itself.

Q. In itself. The main difficulty, as you explained it, is the intervertebral disc between the lumbar region and the sacrum, is that correct?

A. No, sir, all the soft tissues about the joint. By way of explanation, this joint is the one between the spine and the pelvis, between the lumbar spine

(Testimony of Neil P. McCloy.)

and the sacrum. The sacrum is the back of the pelvis. The nature of this injury is a tearing of all the soft tissues about that joint and probable injury to his intervertebral disc.

Q. Doctor, I know that all of us are interested in rehabilitation of a person that has been injured. What do you feel can be done to possibly rehabilitate this man, the physical and mental condition that he has?

Mr. Cummins: This is beyond the scope of direct examination and cross-examination, your Honor. [230]

The Court: Overruled, but I think the question should be phrased to the extent that the condition could be, maybe, associated directly with the physical infirmities. A. Yes.

The Court: Otherwise, of course, the mental condition would not have any particular relevancy, doctor.

A. His mental condition, is, of course, because of apprehension, anxiety over his future as to whether he will be able to return to a gainful occupation, preferably his own, and so forth. I believe that can be indirectly or directly associated with his injury, because it appeared after his injury and because of his injury.

Q. (By Mr. Papas): And what do you feel can be done to rehabilitate that condition?

A. Do you wish me to outline a treatment, more or less?

Q. I wish you would, sir.

(Testimony of Dr. Neil P. McCloy.)

A. I believe he would be benefitted by being sent to a rehabilitation center where he would be given exercise therapy to gradually build up his strength. Also occupational therapy. He is taught to very, very gradually use his back, and thereby gain confidence in himself, to say nothing of improving his back. This would have to be closely supervised and would probably go on for a period of possibly four, five, six months.

Mr. Papas: No further questions.

Mr. Cummins: I have nothing further. I would like to give [231] the doctor back his notes, though.

The Court: Doctor, just one question, please?

A. Yes, sir.

The Court: Is the plaintiff wearing a corset or brace at the present time? A. Yes, sir.

The Court: That is the corset or brace you described for the jurors and the court?

A. Yes, sir. He is wearing a metal type of brace as originally described. It does about the same thing as a corset. It limits motion in the lower back.

The Court: Is there any physical discomfort to the wearing of that brace or apparatus?

A. Not very much. He actually obtains some relief from the wearing of it, according to his statement.

The Court: How much longer do you anticipate he might, under the ordinary course of reasonable expectation, how long would he wear that support?

A. Depends on how he got along. If he were to

(Testimony of Dr. Neil P. McCloy.)

improve gradually he would probably like to remove it after a period of exercise therapy so that he could support himself, and it would be removed gradually over a period of three or four months.

The Court: Doctor, this question may have some psychiatric aspects, but do you believe that the present asserted apprehensions on the part of this man are related in any way [232] to the injury sustained, or have they some relationship to a prior condition which has been referred to in the evidence?

A. They have no relationship to a prior condition. This condition is a fear of pain and fear of being unable to go back to a gainful occupation.

The Court: I notice the posture of the plaintiff. He has a very peculiar posture. Have you noted that, doctor?

A. Yes, sir.

The Court: Do you think that is a feigned posture? Do you think that it is one that is brought on by some malingering, or is it something you can definitely tell the court and jury is the result of an injury?

A. No, sir. Some of his postural defect, as you can see it, existed before this accident.

The Court: To what extent, doctor?

A. He had a curvature of the spine and a moderate sway back before the accident, which were symptomatic, and according to his history he has never been bothered by his back previously. He had one accident before, in 1939, I believe, when he was squeezed between a gondola and a barge

(Testimony of Dr. Neil P. McCloy.)

rib cage; but he had no back injury. He does, from side to side, at which time he injured his therefore, give no history of trouble with his back prior to this accident. The postural changes that he had are congenital and are not related to this accident. [233]

The Court: What in your opinion, doctor—this may have been answered, and if it was answered you need not answer it again. What is your opinion as to the prospect of this man returning to a gainful occupation, that is, within the area of his——

A. To his own occupation?

The Court: Yes.

A. I think it is possible in a year or so. I do not believe that it is probable.

The Court: He is a switchman?

A. He is a switchman. Inasmuch as the occupation requires considerable agility.

The Court: Yes. All right. Any further questions?

Mr. Cummins: Yes.

Q. Do you think, Doctor, he will be able to work at that? A. Yes, sir.

Mr. Cummins: That is all.

The Court: Thank you, doctor.

A. Thank you.

(Witness excused.)

The Court: We will take the noon adjournment, ladies and gentlemen, and resume at 2:00 o'clock this afternoon. Same admonition not to discuss the case under any conditions or circumstances or

form an opinion until the matter has been submitted.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [234]

Tuesday, October 3, 1951, 2:00 P.M.

The Court: You may proceed.

Mr. Papas: That concludes the plaintiff's case, your Honor. We rest.

Mr. Cummins: Your Honor, may I make an opening statement?

The Court: Yes.

Mr. Cummins: Your Honor, Mr. Papas and Mr. Michael, and ladies and gentlemen: I will make my opening statement quite brief because you have already heard most of the evidence in this case and I didn't wish to repeat what you are going to hear from plaintiff's witnesses, which I am sure if I had started out at the beginning I wouldn't have anticipated accurately anyhow. So it is just as well I stand here now to tell you what the defendants will prove, what at least I anticipate we are going to prove.

Now, I want to caution you, I am an attorney and just as prejudiced on my side as Mr. Michael and Mr. Papas is on his side and I am guided by the ethics of my profession the same as the other attorneys are, but nevertheless in my zeal I might tell you something that isn't borne out by the evidence. Don't take what I say as evidence. It is just a statement of an attorney. This is what I anticipate the evidence will show.

First of all, we are going to call Dr. Luckey. Dr. Luckey is a doctor at Stockton, California. I took his [235] deposition a few weeks ago thinking that I could read what he had to say to you instead of calling him away from his practice. However, he wasn't cross-examined at that time, plaintiff's counsel requesting that he come to San Francisco. In view of that request I have asked that Dr. Luckey re-examine Mr. Seamas and he did so this morning and had additional X-rays taken.

Now, Dr. Luckey is here and I anticipate that he will testify substantially that apparently Mr. Seamas did have a back sprain from some fall which he has told you about. I think he will classify that back sprain as slight or mild. At the most moderate, that there was no external evidence of injury when he saw him, but because of his complaints of the patient himself he carried out the usual therapeutic measures that an orthopedic physician utilizes. He taped his back and subsequently, because of continued complaints of pain in his back he put him in traction.

Now, traction means simply stretching the legs with a weight and you have probably been in a hospital and seen people in traction. That during that time he found—before he put him in traction he found muscle spasm. After a period of weeks he found muscle spasm, not immediately, no splinting of the muscles to hold the spine straight when he first saw him. But subsequently it developed that he thought there might be muscle spasm there

but that regardless of the fact that he put him in traction and relaxed him in bed for a period of several [236] days the so-called spasm did not disappear so he changed his diagnosis and his opinion. That it wasn't muscle spasm, but it was a voluntary effort to hold the back rigid.

The evidence will continue to show as it has already that there is no evidence of injury in any X-ray. There is the hypertrophic fringing on the body of the third lumbar vertebra which if you were close enough you saw in the X-rays already submitted. Both, those taken after December 9, 1950, and in the only taken in 1939. The evidence will be from Dr. Luckey that that particular 1939 X-ray—he hasn't yet seen the other two—all of the X-rays show either one of two things. A previous compression fracture of that vertebra or—and more likely, a congenital condition of that particular vertebra, or possibly simple arthritis which we almost invariably get in our spine as we get older.

Now, Dr. Luckey is the doctor who treated the plaintiff over a period of several weeks and I think he last saw him in July of this year. Dr. Luckey noted that Mr. Seamas was using crutches and subsequently a cane, and he told him to stop doing it, that it wouldn't help him. I believe the doctor will tell you that as far as any organic injury this day is concerned, that there is none. None. That the disability which Mr. Seamas appears here in this courtroom to be suffering is his own mental attitude which disables him. He is disabled. I think the doctor will you tell you that it isn't necessarily a

voluntary [237] thing on Mr. Seamas' part. These things also can happen involuntarily. Some people are of a makeup, a mental attitude, condition of makeup so that they are suggestible. Mr. Seamas is one of those people.

Dr. Luckey I believe will give you his prognosis. I am unable to give it with any degree of accuracy so I will wait until Dr. Luckey takes the stand and ask him his prognosis, medical terminology which is the outcome of this case, what he thinks is going to happen to Mr. Seamas subsequent to this date, the treatment that he advises, and I will not go into that at this time. He will be the next witness.

Now, so much for the allegation of injury and damages in this case. I will take up now what I think our evidence is going to show you folks on the issue of negligence and liability. I am going to call Conductor Marrs, or Engineer Marrs. He was acting as fireman on the night of the occasion in question. I am going to call him for a very limited purpose, and that is to add one knowledge to the discrepancy in plaintiff's statements that he told everybody about his back injury the night of this so-called accident. Engineer Marrs will tell you folks it wasn't until two weeks later that he knew an accident was supposed to have happened or that the plaintiff claimed that he was injured in any accident. That he was not present sitting, as Mr. Seamas told you, at a table when he told all about how his back hurt him. I am going to call also the engine foreman. [238] The engine

foreman's name is Mahan. You have heard his name before. He will tell you folks what happened within his sight and hearing on the night of this alleged accident. Mr. Mahan was standing in the vicinity of No. 10 switch which is designated on this exhibit 3 as the bull switch. He pushed one car toward No. 9 with a kick move.

Now, we throw a lot of medical terms at you, and legal terms, and then we add railroad terms. A kick move is simply, you have hold of a car with the engine or with other cars and you move forward, and then a switchman grabs hold of what railroaders call a cut lever. It is a lever that sticks out from the coupler to the side of the car, and he gives that cut lever a yank and that separates the cars and it permits the car to drift on down the track—to roll down the track. Drift is another railroad term.

Well, that was done on this occasion. One car was cut off, but there was a little swale there and they sometimes don't kick a car at that particular point hard enough to make it roll as far as they want to go. If they kick it too hard it is liable to run across the yard, particularly if there is no brake at all set up on it. In this instance there may have been a slight brake set on that car. If there was, Mr. Mahan will tell you it wasn't necessary to release it. It was desirable to have it on there so that it wouldn't roll too far. They would give it another kick and shove it where they wanted it to go and it [239] would set there. Brakes on a railroad car aren't like an automobile.

They are steel, iron, press against the wheels. You wear them out very slowly.

Now, he made this one move and pushed this one car not far enough to get it into No. 9 track. He didn't kick another car. He had the whole train come against that car to shove it farther. Now, that move is like this. When they come together they couple up—they may couple up, they don't necessarily couple up; but they are expected to couple up if the coupler is open. If it isn't, they will just be shoved. If it isn't coupled up they have to be cut again. Some switchmen have to pull that switch again. In this instance they went—they weren't open to couple so that when they were cut this car simply went right on down the track where it was supposed to go. Now, it was hit harder, I think Mr. Mahan will tell you this, than should have been if someone was on the other side or blind side of this train and didn't know that the car was going to be hit. It was hit two and a half to three miles an hour, within the permissible limits to prevent any damage to the car or to the cargo that might be in a car. This one, I believe, was empty. But for someone on a ladder unsuspecting the car to be moved it would be quite a surprise.

Mr. Mahan will tell you that the last conversation that he had with Mr. Seamas was when he handed him some instructions [240] as to what to do. The next conversation was five or ten minutes after this alleged accident when Mr. Seamas showed him his leg and said, "Look, I got a scratch. I got knocked off that car." And he made no mention of a back

injury or any other injury, and made light of his scratch. There was no conversation, Mr. Mahan will tell you when these two cars that you have heard in plaintiff's case were supposedly coupled together and plaintiff came over here to see if they were coupled—there was no conversation when, as plaintiff said, he walked east to the end of these supposed two cars and told Mr. Mahan he was going high, to let off their brake. There was no instruction and no permission from Mr. Mahan to go on the blind side of this train to release a brake or to climb up on the car on the blind side of the train. Mr. Mahan will tell you this too. That it is the custom on every railroad in the United States of America to operate on one side of the train, the engineer's side, where signals can be passed. That if, and only if the other members of the crew, the foreman or switchman on the engineer's side knows, is informed that a man is going on the blind side of the train and climb up on the cars, can that man do that unless he takes his own risk and carelessly climbs up when no one on his own side of the train knows that he is going to be there.

Mr. Mahan will tell you he did not know Mr. Seamas had any intention of climbing on the blind side of the train, that he did not know Mr. Seamas did climb up on the blind side of the [241] train, that he did not at any time see a light or reflection of a light on the car on which Mr. Seamas did climb or in its vicinity.

I have fallen heir to the fault all attorneys have.

We talk too much. I am going to say this, that if I prove the facts I have just indicated to you, I am going to ask you for your verdict.

Call Dr. Luckey, please.

DR. C. A. LUCKEY

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name, your address and your professional calling to the court and to the jury?

The Witness: C. A. Luckey, 333 North Sutter, Stockton, California. I practice orthopedic surgery.

Direct Examination

By Mr. Cummins:

Q. You maintain your office in Stockton, doctor?

A. Yes.

Q. You will recall I took your deposition October 2nd—that can't be right——

A. It was some day last month.

Q. About a month ago, September 7, 1951?

A. About a month ago, yes.

Q. About three weeks ago. You weren't cross-examined at that [242] time? A. No.

Q. Have you been served with a subpoena by the plaintiff? A. Yes.

Q. You examined Mr. Seamas this morning, didn't you, Doctor? A. Yes.

Q. Now, without modesty, Doctor, I would like

(Testimony of Dr. C. A. Luckey.)

for you to tell the jury something of your background.

A. Well, let's see. I graduated from medical school, University of Nebraska in 1939. I served one year of interneship in the Alameda County Hospital in Oakland; spent three and a half years of training in orthopedic surgery at the Mayo Clinic; spent three years——

Q. In Rochester, Minnesota?

A. Yes. I spent three years doing orthopedics in the army, and I have been in the practice of orthopedic surgery in civilian life for five years.

Q. Have you written anything in the field of your specialty, Doctor?

A. I have written several articles.

Q. Have you had them published?

A. Yes.

Q. Doctor, are you a member of any boards or staffs?

A. Yes, I am a member of the American Academy of Orthopedic Surgery, American Board of Orthopedic Surgery, American Society [243] for Surgery of the Hand, Western Orthopedic Association and the state and local medical societies.

Q. You are authorized to practice in California?

A. Yes, licensed in 1939.

Q. Doctor, have you specialized in any field of medicine? A. Yes, in orthopedic surgery.

Q. What is orthopedic surgery?

A. Well, that has to do with that branch of

(Testimony of Dr. C. A. Luckey.)

service which deals with treatment of injuries of the musculo-skeletal system and associated structures. In other words, the bones, joints, ligaments, tendons, muscles, nerves.

Q. Are you the type of doctor that handles back sprains and back injuries?

A. Yes, we treat those rather frequently.

Q. Have you had many of those in your experience?

A. Well, I think anyone that practices orthopedic surgery sees more low back pains and back sprains than anything else.

Q. What was your experience in the army? What kind of work did you do then?

A. Well, I was primarily doing reconstructive work. That is, treating war casualties.

Q. Over what period of time did you do that?

A. Three years.

Q. Now, what was the occasion of your first seeing Mr. Seamas?

A. Well, I first saw him at his home on the night of December [244] 9th at which time he was complaining of pain in his lower back, and he told me that he had fallen off a boxcar while at work.

Q. How did you happen to be called to his home?

A. Well, to the best of my knowledge I think the patient called me.

Q. You went to his home? A. Yes.

Q. What did you do? Did you examine him?

A. Examined him and taped his back, and I

(Testimony of Dr. C. A. Luckey.)

gave him a prescription for some sedation for some pain pills.

Q. What did he tell you in the way of history, what had happened to him?

A. At that time he told me he was at work when he was knocked off a boxcar and fell. I don't recall any more detailed points but also he told me that he was complaining of pain in his lower back at that time.

Q. Any other complaints?

A. The patient also complained of pain in his left leg although I can't recall if he told me specifically he had pain in the left leg that night, or if he told me when I saw him the next visit which was January 3rd.

Q. All right. Did you look at his knee or something that was scratched, cut

A. Well, I don't recall offhand. I vaguely seem to—well, I am not sure. It was something that half way rings in my mind, [245] but I am not positive.

Q. Was there anything serious about a cut or scratch that you had to treat that night?

A. Not that I recall. I treated him primarily for his back.

Q. Doctor, did you arrive at any diagnosis after your first visit?

A. Well, the patient was complaining of pain in his back and I felt that he had some muscle spasm and I made a note to that effect in the chart. He had limitation of back motion, and he was

(Testimony of Dr. C. A. Luckey.)

tender over the lumbo-sacral area. That is, he was tender over the very low back.

Q. You say he was tender. How did you determine that?

A. That of course is determined by feeling. That is, putting your finger over areas in the back and asking the patient if he feels pain.

Q. Do you have to depend in any degree on the patient?

A. Well, yes, tenderness of course is a subjective affair and you can't determine tenderness by what you feel with your fingers. You have to rely on what the patient says when you feel various areas.

Q. You said he had limitation of motion. What did you mean by that?

A. Well, I meant by that that his back didn't move through—his back didn't move as much as it should.

Q. Is that objective or subjective? [246]

A. Well, of course when you look at it, to the examiner it is objective. To the——

Q. When you see him not move, is that it?

A. Yes.

Q. Is it in any way subjective?

A. Well, of course that is up to the patient. After all, the examiner is merely looking for the range of motion, and if the patient doesn't move as much as he can, why—in other words, there may then be a subjective element to it.

Q. Was there anything that you could see that

(Testimony of Dr. C. A. Luckey.)

you would refer to as an objective symptom that first visit?

A. Well, no, because objective is something like a broken bone or something that you can definitely put your finger on and except for the limitation of motion which is objective on the examiner's part there was nothing else objective.

Q. What was your purpose in taping his back?

A. Well, I felt that the patient had sustained a sprain of the back and of course taping the back would limit the motion of the back. In other words, sprains are treated primarily by limiting motion, by putting them at rest.

Q. Is that the usual treatment for complaints of a patient such as Mr. Seamas' seemed to you?

A. That is one of the forms of treatment, yes.

Q. When did you next see him?

A. Well, then I saw him on January 3rd, at which time he still [247] had a good deal of limitation of motion, and I felt that he was having a definite pain in his back. I felt that he had muscle spasm, and due to the fact that he was having the complaints of pain in the low back with some radiation down the back side of the left leg, I admitted him to the hospital, where we put him in traction. By traction I mean that you put some tape on each leg and then you put a pulley at the end of the bed and put a rope from the tape on the leg through the pulley and at the end of the rope you tie a weight so that there is a continuous

(Testimony of Dr. C. A. Luckey.)

pull on the legs day and night. That, of course, is to put the injured part at rest.

Q. Is that again the type of treatment that you use for complaints that Mr. Seamas was giving?

A. That is one of the standard forms of treatment, yes.

Q. What hospital did you have him in?

A. St. Joseph's Hospital in Stockton.

Q. Now, incidentally, are you employed by the Santa Fe Railway Company? A. No.

Q. Do you regularly treat patients for the Santa Fe?

A. I very rarely treat patients for the Santa Fe.

Q. The Santa Fe did pay you for treating Mr. Seamas?

A. Well, I suppose they paid us. I don't know whether we are paid. I guess we are, though, or I presume we will be paid. That is not my department. [248]

Q. Well, then, did you again see Mr. Seamas?

A. Well, yes. Then we put him in the hospital for—I can't remember exactly the length of time, I would say roughly ten days. Then, of course, the thing that was a bit puzzling is that Mr. Seamas complained of a good deal of pain while lying in bed. Now, it is a well-known thing in medical circles that if a patient has a mechanical back strain at least the symptoms should subside when they are lying quietly in bed or when they are lying quietly in bed and have traction on the legs. Mr. Seamas, after he was there for a while, con-

(Testimony of Dr. C. A. Luckey.)

tinued to complain of pain even though he was at bed rest, and therefore after roughly ten days or something like that, I felt that we would accomplish nothing by further traction, so we discontinued it. The patient still, of course, complaining of pain at bed rest.

Q. Did he have spasm at the time you released him from the hospital?

A. Well, by muscle spasm we mean that the muscle is tight. It is partially contracted through no effort on the part of the patient. His system does that, but he doesn't do it. Now, that is muscle spasm. That is in contrast to voluntary muscular effort, which means that the patient is tightening the muscle himself. Now, of course, it is a difficult task sometimes to tell whether you are dealing with spasm or whether you are dealing with voluntary muscular effort. Now, the first two visits I felt the patient was definitely having spasms. We [249] saw this patient over a considerable period of time. The physical therapists in the office treated him daily over a considerable period of time, then three times a week, and so on. But during all this time he continued to have considerable limitation of back motion.

Well, then gradually it developed, and I can't tell you the exact time when I realized that the patient was no longer having muscle spasm but was having considerable limitation of back motion not due to spasm.

(Testimony of Dr. C. A. Luckey.)

Q. Was he in your charge—I mean, were you the only doctor that was treating him?

A. Yes.

Q. Over what period of time did you treat him?

A. Well, let's see. January through June rather intensely, and then I think about a couple—two or three visits in July. So I treated him pretty intensely over a period of about six months. In addition to the heat and massage, the patient was wearing crutches, which we did not feel was good treatment for a back sprain. Crutches, as you know, are used for leg injuries, but it doesn't work out very well with back pain, and we tried over a considerable period of time to have him discard the crutches, and I finally tried to have him get rid of one crutch, and then the next one. Gradually he did discard the two crutches and used a cane. He complained a lot, and as I said, we did everything possible. We finally [250] fitted him with—let's see, I think he had a canvas belt and I finally fitted him with a metal brace which we call a chair-back brace, which he is wearing at the present time. After he wore that for some period of time we suggested on numerous occasions that he discard the brace and step up the activity, because I felt that after muscle spasm had quieted down that we were developing what we in medicine call a functional overlay. Now, by that I mean that a patient has an injury and then he recovers from that injury but he has developed fixations in his mind so that he continues to have pain in his back. Now, I hope I made that

(Testimony of Dr. C. A. Luckey.)

clear. In other words, it is what is called a neurosis. I feel that at this time the patient is disabled. I think that he has pain in his mind, but I do not feel that he has any organic disturbance in the back. By organic disturbance I mean that I don't think he has any sprain remaining in his back. That decision is arrived at on the way the patient walks, and after all, after you see a lot of the patients with back injury, you see how they walk and then you compare their gait with this patient's gait and the way he places his hands on his hips.

So his gait is one point which makes me feel that he has a neurosis. No. 2, he has as was told to you this morning—he has no muscle spasm at this time, but still he has no back motion. I have seen him on a number of occasions in the office; I examined him again this morning and asked [251] him to bend over and his back does not move. Any bending that he does is done at the hip joint. So he has a fixed back, which is due not to muscle spasm but due to the neurosis. Another very important point, if he were suffering from strain at this time he should have a localized point of tenderness. By that I mean, let us say, that his lumbosacral joint—that is the joint in the low back—was sprained at the time of the injury, and I feel that it was sprained. If he was still having pain from that particular sprain he should have rather localized tenderness. He was examined this morning and again in the presence of both attorneys, and I

(Testimony of Dr. C. A. Luckey.)

think they both saw that this patient's back was very tender from the first lumbar vertebrae to the sacrum. In other words, the back from there to there (indicating) he is very tender, and on the back side from there to there (indicating). In other words, there is an area almost a square foot where this morning I just barely placed my hand on his skin and he complained of a lot of pain. Well, we are dealing with a sprain, we are dealing with structures deeper than the skin, that is, down some distance, and usually even though a patient has a good deal of distress you have to press reasonably firmly to bring forth pain. So that point, alleged tenderness over a very large area, is another point in favor of the fact that he is now suffering from a functional overlay or a so-called neurosis.

Q. Well, Doctor, what can you say about voluntary or [252] involuntary character of a functional overlay?

A. Well, let's put it this way: If we feel that a patient is trying to put the wool over our eyes, if he is lying about the situation, we say that he is malingering. I don't feel this patient is malingering. I think that he has a neurosis. In other words, I rather doubt that he has very much control over the situation. You never know, of course, but a neurosis, a true neurosis, usually the patient at least for the time being has no great control over the situation. That is what distinguishes a neurosis from an individual who is malingering, that is, putting on.

(Testimony of Dr. C. A. Luckey.)

Q. I see. What is the cause of such a functional overlay? What are the causes, if there is more than one?

A. Well, of course, that can be debatable. We might call in general terms as I mentioned in the deposition the other day. We saw a lot of these people in the army. In other words, they developed what in the textbook is called a camptocormia. Camptocormia is an individual who develops a very stiff spine due to a product of his mind, and in the service we saw those people—if there was something beyond that was distasteful, like an infantryman about to go overseas, he might develop it because he was worried about the consequences, and I am sure the literature will bear this out. Those people were discharged, and the discharge from service took care of the situation. In other words, eliminating the factor that was responsible. [253]

Q. You mean they got better? A. Yes.

Q. What is this camptocormia?

A. Well, camptocormia is a condition wherein the patient has stiffness of the back and complains of pain in the back, but has no injury to the back, and the symptoms are the result of his thinking.

Q. Have you told us all the treatment that you gave Mr. Seamas?

A. Well, let's see. I mentioned heat, massage; we gave him a lot of exercises, we told him to gradually increase his activity. He had a support which we have been suggesting that he gradually

(Testimony of Dr. C. A. Luckey.)

get rid of; I mentioned the traction. I think that is it.

Q. Do you feel that he should wear a belt now?

A. Well, I think—here is the point. He has worn that brace over a long enough period of time so—if you put a cast on a leg over a long period of time the muscles are going to get weak, so you have to build them up. I think he should get rid of the brace. True, if he takes the brace off he may have a little distress just from wearing it so long because he has had a limited motion of the back. When you take it off it is going to move, so I think he should get rid of it in a short period of time; discard it completely. I think it would be much better for his back. [254]

Q. Is there anything of significance in the X-rays that you want to comment about?

A. No, there was just—well, there is one point. May I see an old X-ray, or shall I use these?

Q. Doctor, I hand you—here are two X-rays that were taken subsequent to the date of December 9, 1950.

A. Well, there was just one point I wanted to make. I think it was clear that the—the X-rays are negative. In other words, the X-rays don't show anything abnormal so far as this injury is concerned. The question was brought up whether there was any narrowing of one intervertebral disc. People's backs vary. In other words, there are a certain number of them, roughly ten to fifteen per cent, who have a little variation from normal which

(Testimony of Dr. C. A. Luckey.)

is called a congenital abnormality, and that was mentioned previously. Now, this patient has a congenital abnormality. I only mention it because I think the point was raised whether the last—whether there was some thinning of the last disc which is this space that you see down here (indicating). I feel that that space is normal for this reason. That anyone who has a congenital disturbance in the back with a low-lying disc always has a narrow disc. By that I mean this, that normally the last disc you would see would be at this level (indicating), but now you see one down here. In other words, under normal circumstances this would be one and that would be the first one you see (indicating). So the last [255] disc you see in this X-ray is thinner than the one above it, but because it is a low-lying disc it is natural. That is just the normal anatomy of structure.

Q. Now, Doctor, here is an X-ray taken in 1939. Do you notice anything different about it than the one that is already in the box?

A. No, there is nothing different. The only point I am talking about, the last disc, the last cushion—it doesn't show on this X-ray, though.

Q. What about this other one? Let's identify them a little for the record here. The one you had in the box before that was taken subsequent to December 9, 1949, is No. Plaintiff's 5, and the 1939 is Defendant's C.

A. This is plaintiff's No. 6. Well, that shows the last cushion. You can see it better on this film

(Testimony of Dr. C. A. Luckey.)

than you could on the previous one, and you see there is no loss of—in other words, the two bones in the back don't touch here. In other words, you can see the disc space well there. It is the same as the previous one.

Q. Now, following your last examination of Mr. Seamas which you did this morning, can you give us a summary or idea as to what your diagnosis is today?

A. Well, my diagnosis, of course, is functional overlay or a neurosis manifest by limited back motion and back pain.

Q. Have you any treatment to prescribe? [256]

A. Well, I feel that further physical treatment is going to accomplish nothing because we, as I said before, bent over backwards to do everything possible and had the man come in frequently, which we had hoped would be a form of psychotherapy. That is, by getting his confidence and so on, and yet we accomplished, I would say, very little or nothing. So I don't think that further physical treatment in the way of heat massage and so on is going to accomplish anything. Possibly psychotherapy may have accomplished something.

Q. What do you mean by psychotherapy?

A. By psychotherapy I mean having the patient consult a psychiatrist, and have him delve into the situation and see if he can accomplish something.

Q. Would that be treatment for the functional or neurotic element in the case? A. Yes.

Q. May I ask what your diagnosis—what your

(Testimony of Dr. C. A. Luckey.)

prognosis is, the outcome, in your opinion, in this case?

A. Well, of course, as I told you before, and as the medical literature is full of cases like this, they had many cases in the army that cleared up with dismissal from the service, and I can't tell you when this patient is going to clear up, but many times at the termination of a case they do improve.

Q. Do you think he can work?

A. Well, I feel the man can certainly do light work. I don't [257] know about—I don't think that he is capable of doing work that calls for any physical activity of significance because he still has his fixation on his back.

Q. Have you an opinion as to his ability to return to work as a switchman sometime in the future?

A. Well, I can't recall ever seeing the literature where a camptocormia ever persisted. In other words, I can't honestly say that anyone ever had a condition like this and never got over it. In other words, they get over it. They clear up. They disappear.

Q. You noted Mr. Seamas' posture. Could you tell us, is that camptocormia?

A. Yes, camptocormia is—the posture is one of the significant things, not particularly holding the hands on the hips, but the sort of forward tilt and sometimes tilting off to the side. Sometimes it will even go to the point where they hold their neck and

(Testimony of Dr. C. A. Luckey.)

head stiff so that they move the entire body when they look around.

Q. Is there anything about this congenital thing that you pointed out to us that has any effect on camptocormia?

A. No, I don't think it has any significance.

Q. What about his posture? What is the cause of his posture? Is camptocormia the full answer or partial answer?

A. Well, I think the patient has more swayback-ness than normal. In other words, we don't all have perfect posture. He is more [258] swaybacked than average, so to begin with he is more swayback than normal, but that doesn't account for the complete posture. The second phase of the posture, that is, the forward tilt, of course, is the position all camptocormias get in. Now, you say, well, why does he walk that way rather than leaning toward the north, or south, or right, or left? Well, I don't know. That is just the way they end up.

Q. I have neglected to ask you this, about this—I don't know what to call it, on the third lumbar vertebra. Do you know what that is or have you an opinion as to what it is?

A. That could be one of two things. It could be as was mentioned previously, it could be the result of a very old compression fracture or it could be developed mental. By developed mental I mean that there is a small growth center in that part of the bone and when the bone grows it sometimes grows out a little more prominently at one corner

(Testimony of Dr. C. A. Luckey.)

than it does at the rest of the bone, so it could have developed mental. That is, been there since birth. Or it is possible that it could have been due to some mild compression. I would say if it is due to a compression it would have to be that it would have occurred a number of years before that last film of 1939.

Q. I have told the jury that there might be another alternative, that is, arthritis. What about it?

A. Well, this man is 37 now. That X-ray is 11 years old. You see, he would be rather young for arthritis. It is [259] possible but highly improbable, I would say. It would make him in the neighborhood of 25 or 26, somewhere in there. That is a little bit young for arthritis.

Q. I will stick to being a lawyer hereafter. That is all. Cross-examination.

Cross-Examination

By Mr. Papas:

Q. I won't keep you too long, Doctor. I understand you are rather anxious to get back to "God's country," as you put it. Now, Dr. Luckey, you stated that you examined Mr. Seamas on the evening of December 9 of 1950? A. Yes.

Q. What time was that, sir?

A. Well, gee, I don't know. You know, that has been a long time ago and a lot of patients have been seen since, and I—I don't know.

Q. You recall it was at night, is that correct?

A. Yes.

(Testimony of Dr. C. A. Luckey.)

Q. And did you have your medical kit with you when you went out to see him?

A. Well, I presume so, because I taped his back.

Q. I see. Well, may I refresh your memory, Doctor?—it was around Christmas time. Isn't it true, as a matter of fact, that you were at a party and his neighbor called you, and you made an appointment with him at your office at about 11 o'clock that night? [260] A. At my office?

Q. Yes, sir.

A. Well, it seems to me I saw him at his home the first time, December 9th.

Q. Would it be possible that you were at the party and were called and met him at your office?

A. Well, I don't know. It is possible, yes. It seems to me I saw him at the home the first time and in the office the second time, although it could have been at the office. As I say, I just—I saw him once place or the other December 9th, I know that.

Q. Now, Dr. Luckey, are you positive that he was wearing crutches? A. When?

Q. Are you positive that he was using crutches after you saw him the first time?

A. Oh, no, no. He didn't start using crutches until after he was—oh, as I recall, I think he was out of traction before he had crutches.

Q. In other words, he had been released from the hospital by you and then you saw him with crutches?

A. Yes, as I say, I can't recall the exact time the crutches were worn, but to the best of my

(Testimony of Dr. C. A. Luckey.)

knowledge some time after the dismissal from the hospital, I think.

Q. You state that you saw him for a period of time and he was [261] using crutches?

A. Yes, he was—well, he came in the office, oh, daily for some period. That is, daily through the working week, and as I say I can't tell you how long the crutches were worn, but he used the crutches, yes.

Q. And you can't say definitely whether he used them for a week, or a month, or two months, or three months?

A. Well, no, I don't know the exact time. I know that it was definitely over a week, though.

Q. I see. Now, Dr. Luckey, you stated that you have not been paid?

A. No, I didn't say that. I said I don't know whether we have been paid or not.

Q. In other words, you haven't checked your records?

A. I haven't checked the—what we call the business office records.

Q. I see. And do you keep that, or one of your girls keeps it? A. One of the girls keeps it.

Q. I take it if you haven't been paid you expect to be paid?

A. Absolutely, we are not working for charity.

Q. Now, Dr. Luckey, you stated that you next saw him on January 3rd of 1951; is that correct?

A. Yes.

Q. And do you know who was treating Mr.

(Testimony of Dr. C. A. Luckey.)

Seamas between December 9 of 1950 and January 3 of 1951? [262]

A. I think Dr. Weiss was, of Stockton.

Q. Do you know, Doctor, just of your own knowledge, as to whether or not he was receiving any type of treatment from Dr. Weiss?

A. No, I don't.

Q. You don't?

A. I don't know what Dr. Weiss was doing.

Q. Did he discuss with you the type of treatment that Dr. Weiss was giving him?

A. Well, he might have, but if he did I don't recall it.

Q. And now when he came back to you on January 3 of 1951 did he come back to you on his own volition or was he sent to you by the Santa Fe Railroad?

A. Well, you asked me that the other day, and I—as I said, I am not sure whether he came to me directly or whether he was referred.

Q. Can you tell us, Doctor, whether you talked to any claims adjuster or anyone from the Santa Fe Railroad before January 3 of 1951?

A. Well, I rather doubt it. I talked to Mr. Anderson somewhere along the line—frankly, I don't know when I talked to him first. Well, I really don't know when I talked to Mr. Anderson the first time.

Q. There is nothing in your record to indicate when you first talked to him? A. No. [263]

Q. I see. And, Doctor, did you consider Mr.

(Testimony of Dr. C. A. Luckey.)

Seamas after he came back to you on January 3rd as your patient?

A. Oh, yes, yes. I think the record will show how many times we have seen him here.

Q. Doctor, in the ordinary course of events, if I were to come to you as a patient there is naturally a confidential relationship between you and me, is there not?

Mr. Cummins: Object to that. I think the case opens up that provision of confidence.

The Court: Ordinarily there is a relationship of confidence, but when a witness is called, the privilege is dispensed with ordinarily.

Mr. Papas: Yes, we realize that, your Honor.

The Court: Do you have some other point in mind?

Mr. Papas: Yes, sir, I do.

The Court: Well, I will tell you, we might take the recess period and discuss it. Ladies and gentlemen, may I ask you not to discuss the case under any conditions, or to form an opinion in the matter until it is submitted to you. We will take the afternoon recess and I will discuss these matters with counsel.

(Thereupon the jury was excused. Thereafter an unreported discussion was had between Court and counsel.)

(Short recess.) [264]

Mr. Papas: In order to save time, your Honor, may we introduce this original deposition taken of

(Testimony of Dr. C. A. Luckey.)

the custodian of records at St. Joseph's Hospital in Stockton?

The Court: So ordered. No objection, counsel?

Mr. Cummins: Your Honor, maybe I had better look at it first.

The Court: I assumed you had seen it.

Mr. Cummins: I glanced at it, but I did not really look at it.

The Court: All right, I will reserve ruling pending your review of it.

Mr. Papas: Thank you, your Honor.

Cross-Examination
(Continued)

By Mr. Papas:

Q. Dr. Luckey, do you have your records of this matter with you? A. Yes, sir.

Q. May we see those, please?

A. (Handing document to counsel.)

Q. Thank you. Dr. Luckey, this history which you took of Mr. Seamas, was that taken by yourself or by the office help?

A. Well, the writing in there is partly office help, yes.

Q. It is a combination, then?

A. Yes, part of that is the office help.

Q. Dr. Luckey, when you saw him the second time on January 3, 1951, do you recall whether you gave him a complete examination [265] on that occasion?

A. Well, I will say this, that I examined the part involved. I can't remember offhand about the

(Testimony of Dr. C. A. Luckey.)

complete part. I checked him somewhere along the line, but I remember the third of January is when —I know I examined his back at that time because I have a note of it there that he has a great deal of muscle spasm at that time.

Q. You don't recall offhand the date that you sent him to St. Joseph's Hospital for traction?

A. I think it was January 3rd, but it is right there, more or less.

Q. As soon as Mr. Cummins is through, perhaps this will refresh your memory. May we wait a moment, your Honor?

The Court: Yes.

Mr. Cummins: Your Honor, there is a letter in the record which is probably a confidential letter under the doctrine of City and County of San Francisco versus Superior Court, decided this year. However, I have no objection.

The Court: It may be marked in evidence.

(Deposition of custodian of records, St. Joseph's Hospital, was admitted into evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Papas): Would you be good enough to look over this deposition, Doctor? Perhaps that will refresh your memory as to the date he was hospitalized.

The Court: Can you stipulate to that date, counsel, please? [266] You know the date?

Mr. Cummins: Certainly.

Mr. Papas: I am sorry, sir, I don't know.

(Testimony of Dr. C. A. Luckey.)

Mr. Cummins: Whatever it may be.

A. It is January 3rd, more or less.

The Court: Subject to correction, let's state the date as January 3rd. The doctor may correct it if you find it. Then we will get along, otherwise we will be bogged down.

Mr. Papas: All right, your Honor.

Q. Can you recall whether or not, Doctor, on or after that date you submitted a medical report to the Sante Fe?

A. Well, I sent so many reports on Mr. Seamas. I had blanks, railroad retirement, things like that, I have sent so many that I can't tell you what dates I sent them, but I know I sent an awful lot of reports.

Q. Do you recall whether or not you sent a medical report to Mr. Anderson?

A. Well, I know I have sent a report to him sometime, but I can't tell you exactly. Do you have a copy of one on that date?

Q. Yes. It is photostated here, Doctor.

A. Well, if that is, that is it. This is the date, January 4th, yes, to Mr. Anderson, yes.

Q. Would you like to refresh your memory as to that report, Doctor? A. All right. [267]

Q. And would you be good enough to tell us what your diagnosis was at that time when that report was made?

A. As I stated before, I felt this patient had a strain of the lower back towards what we call the

(Testimony of Dr. C. A. Luckey.)

lumbo-sacral—in other words, what we call a lumbo-sacral strain.

Q. And, Doctor, since that time you have stated that—or perhaps I am in error—you felt in that report that that was due to muscle spasm?

A. No, muscle spasm is just another manifestation of a strain. A strain is a pulling of the ligaments, really, then the muscle spasm develops to splint the injured part.

The Court: Doctor, will you explain that to the jury, the physiological reaction so far as the muscle is concerned, whatever it may be?

A. Yes. A sprain is to some ligament, and we are talking about a sprain of the lower back. Any sprain does better for rest, and muscle spasm is an act on the part of the body to make the muscles tighten up, in other words, contract partially so that the injured part will not move. That is muscle spasm. It has nothing to do with the individual. He does not control that.

The Court: Nature automatically provides that defense, isn't that correct? A. Yes.

The Court: All right.

Q. (By Mr. Papas): May I have that a moment, Doctor? Now, [268] Doctor, after he was released from St. Joseph's Hospital, I see your records that he continued to receive physiotherapy treatments from you, is that correct? A. Yes.

Q. Would you be good enough to tell us what those are, what physiotherapy means?

A. Well, in this case, limited to this case, it

(Testimony of Dr. C. A. Luckey.)

means the application of heat to, of course, relax muscles and increase the blood supply to the part. And again, we have massage to, again, do the same thing, to stimulate—to relax the muscles. And also gradually we suggest increased activity with exercises, and doing more little things around the house. In other words, heat, massage and activity is what physiotherapy refers to in this case.

Q. You stated that at first you saw him almost every day this morning for a period? A. Yes.

Q. Then later on you decreased that and saw him approximately twice or three times a week?

A. Roughly, yes.

Q. And the physiotherapy was administered to him at your office, is that correct? A. Yes.

Q. And do you recall when the last physiotherapy treatment was given him? [269]

A. I think it is marked, if you will read it off. Probably June, June 25th.

Q. As late as June 25th—I take it that is 1951?

A. Yes.

Q. He was still receiving these physiotherapy treatments by your office? A. Yes.

Q. And these treatments, I take it, Doctor, were under your supervision? A. Yes.

Q. I take it, too, that the girls in your office were doing the work which is required in this physiotherapy treatment? A. Yes.

Q. Now, Doctor, you stated that you submitted a number of medical reports to, you say, his insurance company?

(Testimony of Dr. C. A. Luckey.)

A. No, the Railroad Retirement Board.

Q. The Railroad Retirement Board, excuse me. And do you have anything in the records to indicate?

A. I don't think so. That is on a double blank I fill in and I don't think they are in there. A blue sheet—I don't know. Well, here is one that the girl made a copy of on January 9th. And many times I wrote them out, because it was a duplication, you know, every week. I don't even—I think they come in once a week, or something like that, and many times I just wrote them out and sent them in. So she has a [270] copy here—after so many duplications, why, you quit duplicating.

Q. And, Doctor, do you recall whether or not in any of those reports you stated that he was suffering from a lumbo-sacral strain?

A. You mean in so many words? That I put down lumbo-sacral strain? Well, let's see that report that you just showed me there on January 4th. I am sure it is in some of the reports. Well, on this report I didn't put down as such in so many words, but I inferred it here in the discussion.

Q. Do you recall when the last report was, Doctor, that you sent to the Railroad Retirement Board stating his physical condition? Do you have anything in your record?

A. No, but I am quite positive on the last report which—well, it was still when we were treating him. I am sure I put down he was still disabled, just as I said he was still disabled now.

Q. Doctor, a patient having received an injury

(Testimony of Dr. C. A. Luckey.)

of the type Mr. Seamas has received, is it possible he may have suffered some traumatic neurosis as a result of it?

A. Yes, that is the same as saying a functional overlay. That is why we use the simplified term "functional overlay." We use the term overlay because it is a carrying over, and you have difficulty —like in this instance, I can't tell you that on June 1st or April 1st, or something like that, his [271] back was OK from a spasm standpoint, and from then on the functional element started. It is what we call an overlay. One just fades into the other.

Q. They combine, in other words?

A. Well, yes, you might—well, that is, I suppose, in part the case. It isn't exactly combined, but, well, as I say, one fades into the other.

Q. Does that happen frequently in persons who have been injured?

A. Well, no, I wouldn't say frequently. It happens, yes, but not frequently.

Q. I see. And, Doctor, X-rays do not show any injury to ligaments, tendons, muscles, do they?

A. No, that is right.

Q. They do not? You have to rely primarily upon your technique that you use in determining whether or not there has been any injury to the tissue? A. Yes.

Q. And X-rays would not show any injuries or derangements to an intervertebral disc, would they?

A. As a rule, no.

Q. Dr. Luckey, a person you say who voluntarily

(Testimony of Dr. C. A. Luckey.)

contracts his muscles has what you called what, sir?

A. Well, we refer to it as voluntary muscular effort.

Q. I see. In other words, if I were to flex my muscles here [272] and hold them tight, that would be voluntary muscular effort? A. Yes.

Q. Is that possible in the lower portion of the back, Doctor? A. Oh, it is possible, yes.

Q. It isn't as rigid, is it, as in other parts of the body? A. No.

Q. In other words, it is more difficult for the patient to go ahead and voluntarily flex his muscles in the back than it is in other portions of the body, is it not?

A. Well, that is true, speaking of people in general, I would say, yes.

Q. Dr. Luckey, you testify in these cases quite frequently, do you not?

A. Well, not any more than I can help.

Q. I see. I take it you come into court quite frequently?

A. I come with great reluctance.

Q. And I take it that in most instances when you are in court, you are in court for the defendants?

A. Well, I wouldn't say most. I would say more so than the plaintiff.

The Court: What was that answer, Doctor? I didn't hear.

A. I would not answer the question by saying

(Testimony of Dr. C. A. Luckey.)

"most," but I probably apear for the defense more than the plaintiff. Put it that way.

The Court: That is in the courts in and about San [273] Joaquin County?

A. Yes.

The Court: I have never seen you before, Doctor, in these courts.

Q. (By Mr. Papas): You are what is known as a defense doctor, is that correct, if I may use that expression.

A. Well, I don't know that I would say that. I have come into court innumerable times when I have been the only doctor testifying.

Q. How many times have you appeared in court this year, if you recall, Doctor?

A. Well, let's see, I was—about four months ago I went once. Well, two and not over three. Maybe two times. That of course does not include industrial accident hearings, which I get called on occasionally.

Q. I take you examine a number of patients for insurance carriers? A. Yes, quite frequently.

Mr. Papas: No further questions, Doctor.

Redirect Examination

By Mr. Cummins:

Q. Doctor, I neglected to ask you if you had in hand any X-rays when you examined Mr. Seamas. Did you have the benefit of any X-rays?

A. Well, at the original time I sent the report

(Testimony of Dr. C. A. Luckey.)

I only had the report and the X-ray wasn't mailed to me at that time. [274]

Q. When did you first see X-rays?

A. Oh, sometime during the time that he was hospitalized.

Q. Do you have those X-rays with you?

A. Yes.

Q. May I see them? Can you tell us just what the date is on them?

A. These X-rays were taken by Dr. Colver, Roentgenologist at Stockton, on December 11, 1950.

Q. And you got them a matter of a few weeks later or a few days later?

A. Not a few days, because I saw him—I saw these sometime about the time we put him in traction. I don't know the exact date.

Q. All right. I didn't ask you to tell us what in your opinion was the degree of sprain here. Can you tell us something about that?

A. Well, I would say not, certainly not over moderate at the most, basing it on mild, moderate and severe. At the very strongest I would not say over moderate.

Q. Have you ever appeared as a witness at the request of the Sante Fe Railroad Company before?

A. No, I have not.

Mr. Cummins: That is all.

Recross-Examination

By Mr. Papas:

Q. Excuse me, Doctor, one more question: [275]

(Testimony of Dr. C. A. Luckey.)

Doctor, do you recall whether you measured the limits of flexion, motion that he has in his back?

A. No. The whole thing is this: by measuring motion, you measure it like this, you measure it primarily by having the patient bend forward and see how far his fingertips will come from the floor. Well, in this case every time I have looked at his back there has been, as there was today, no back motion. In other words, the motion is all in his hips, if you know what I mean, so, as your associate saw today, there was no back motion and so you can't measure the fingertips coming within so many inches of the floor because it has no significance in the back in the moving because it is all hip motion.

Mr. Papas: I see. No further questions.

The Court: The doctor is excused.

A. Thank you, sir.

(Witness excused.)

Mr. Cummins: Mr. Marrs.

BOND H. MARRS

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Bond H. Marrs. My address is Box 374, Riverbank, California. I am a locomotive engineer. [276]

(Testimony of Bond H. Marrs.)

Direct Examination

By Mr. Cummins:

Q. Mr. Marrs, were you the engineer on the train on December 9, 1950, at Stockton, in which Mr. Seamas was a member of the crew?

A. I was.

Q. When did you first learn that Mr. Seamas claimed there had been an accident and that he had been injured?

A. Well, it would be about ten days after the 9th. It would be about 19th or 20th. I wouldn't say for sure, but the first time I heard of the accident was a message I received from the master mechanic, and he wanted to know, or requested me to fill in the company forms and send them to him concerning the accident.

Q. Did you go to the switch shanty or to the switchmen's locker room at any time of the evening of December 9, 1950?

A. During the evening I probably did.

Q. Did you go there after you tied up?

A. Well, upstairs. We are required by company rules to sign certain forms on completion of shift.

Q. Did you hear Mr. Seamas make any remark about having been injured on that date?

A. No, I did not.

Mr. Cummins: You may cross-examine.

(Testimony of Bond H. Marrs.)

Cross-Examination

By Mr. Michael:

Q. Mr. Marrs, where did you go over you [277] tied up that night?

A. I went directly home. I live 30 miles from Stockton and I am usually in a hurry to get there, in other words, to get on the way home.

Q. Excuse me, perhaps I didn't make my question clear. I mean after you finished switching where did you go? You say you finished in the yard. What other part of the yard did you go?

A. Well, the part of the yard where we tie up isn't in that diagram. It would be about a mile from that designated east shanty there. That is the extreme east end of the yard.

Q. What building did you go into at that time?

A. I believe it is called the yard office. Mormon yard office.

Q. Mormon yard office? That has an upstairs and a downstairs? A. That is correct.

Q. Did you go in the upstairs of that building?

A. Yes, sir.

Q. Did you go to the downstairs?

A. Well, I don't believe I did, because, like I stated before, when we tie up that is the end of the shift and I am in a hurry to go home, and I believe I went directly to my car and went home.

Q. You say you believe. You are not sure, then?

A. It is too long ago. I wouldn't—there was nothing occurred that evening to recall an incident

(Testimony of Bond H. Marrs.)

to my mind, and I [278] believe I went directly home.

Q. And you could have come downstairs, but you don't remember, is that the gist of your testimony?

A. I could have, yes.

Mr. Michael: No further questions.

Mr. Cummins: That is all.

The Court: The witness is excused. Thank you.

(Witness excused.)

Mr. Cummins: Mr. Wilson, please.

NEIL WILSON

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Neil—N-e-i-l—Wilson—W-i-l-s-o-n, and my nickname at the railroad is Tug.

The Clerk: And your address?

A. 2107 North Orange, Stockton, California.

The Clerk: Your occupation?

A. Trainmaster of the Atchison, Topeka and Sante Fe Railroad.

Direct Examination

By Mr. Cummins:

Q. Mr. Wilson, are you familiar with an Ajax type brake? A. Yes, sir.

Q. How long have you been familiar with an Ajax type brake? [279]

(Testimony of Neil Wilson.)

A. Well, I have worked for the Sante Fe Railroad for 41 years, and during my tour of duty I have been a switchman, engine foreman, yardmaster, brakeman, fireman, conductor, and my present occupation, trainmaster.

Q. Have you been familiar with an Ajax type brake for a number of those years?

A. Yes, sir. I have handled a number of them during my tour of duty as a switchman.

Q. I show you a book here. Is that a fair drawing of an Ajax type brake? A. Yes, sir.

Q. If you don't mind holding that big volume for a minute, can you tell us what the top of the wheel, where it comes to on a boxcar?

A. This Ajax brake is located at the end of a boxcar, and the wheel of it is a few inches above the top of the car, close to the running board or footboard that is on a boxcar for the switchmen to walk over back and forth.

Q. Is there a picture in that big book there of how they look on a boxcar?

A. Yes, sir. There is one (indicating).

Q. This one right here? A. Yes, sir.

Mr. Cummins: Your Honor, this is a compendium of railroad equipment, but I wonder if we might not pass it to the jury [280] just for the purpose of illustration.

The Court: You may.

Mr. Cummins: (Showing document to counsel.) On page 1042 is a picture at the top of the page of

(Testimony of Neil Wilson.)

an Ajax brake on a car, and on the preceding page is the kind of a detailed cut of the brake.

The Court: The jury may see the illustration.

Mr. Cummins: That is in "Carbuilders Encyclopedia, 1943." (Handing book to the jury.)

Your Honor, shall we wait while it is being viewed by the jury?

The Court: I think you might proceed, counsel.

Q. (By Mr. Cummins): Can you tell the jury how that brake operates?

A. Yes, sir. The Ajax brake which is used at the present time, and which all switchmen and railroadmen are very happy to have applied, this Ajax brake has a wheel and it has a lever on the top that is a ratchet, and it is very easy for a switchman to give this wheel a pull with one hand, and as he pulls it up this ratchet catches all the time, and it is very easy to handle a boxcar and stop the boxcar. And to release the Ajax brake, a switchman or brakeman, all he has to do is reach over and take hold of this handle and pull it over and it trips it automatically and the Ajax wheel spins and releases the brake. [281]

Q. Where does a switchman have to get on a boxcar to release an Ajax brake?

A. Well, I have applied an Ajax brake a number of times during my tour as switchman, and I can set a handbrake from the side of the car by just reaching over and pulling the wheel.

Q. Release it, not set it.

A. I can stand on the side of the car at the top

(Testimony of Neil Wilson.)

and reach over and pull the wheel open and the wheel spins and releases the brake.

Q. Is there any necessity to climb on the brake platform to do that?

A. With an Ajax brake, no, sir, because the Ajax brake don't have to come by the wheel on top of the car with a part about two and one-half feet where there is cogs that you have to twist to brake and these cogs set into holes. On an Ajax brake you release the lever and the brake spins.

Q. Now, can you release an Ajax brake from on top of the car or from the catwalk on top of the car? A. Yes, sir.

Q. How do you do that?

A. Get hold of the lever and trip it.

Q. Do you have to get down on your hands and knees? A. No, sir, I wouldn't have to.

Q. Now, one other thing, Mr. Wilson. Were you present at the station, the railroad station platform early in January of [282] this year with Mr. Anderson, Mr. Seamas, and Mr. Patterson or Peterson? A. Yes, sir, I was on the platform.

Q. Did you have passes or anything like that for anyone?

A. Yes, sir. On this date Mr. Patterson and Mr. Seamas came down to the Sante Fe depot. I had a pass to Los Angeles, I had a permit on our streamlines train for Mr. Seamas to go to the Santa Fe Hospital for attention. I asked him if he wanted to go to Los Angeles, and I also told him if he didn't wish to go to Los Angeles, that if he would pick

(Testimony of Neil Wilson.)

out any hospital in Stockton or any doctor that he desired, that the Sante Fe Railroad would take care of the expenses.

Q. What did Mr. Seamas say?

A. Mr. Seamas said that he would rather stay at home because his wife lives in Stockton and he was among friends, and he would rather stay there and go to a hospital there. I told him to name any hospital in Stockton and name any doctor of his choice and we would take care of the bill. I was representing the Sante Fe Railroad at that time.

Q. What did he say?

A. He said he would rather stay home, and he suggested Dr. Luckey as his doctor, as we agreed.

Mr. Cummins: That is all. You may cross-examine.

Cross-Examination

By Mr. Papas:

Q. Mr. Wilson, your testimony is that you [283] knew of an Ajax brake as approximately a few inches from the top of the boxcar?

A. On this particular diagram that the jury has it shows a few inches. They are not always standard.

Q. They are not always standard?

A. Because there are different locations. But as a rule, on a boxcar they stand, oh, I would say six, eight inches above the top of the boxcar.

Q. Do you know from your own knowledge whether you have seen the particular boxcar that Mr. Seamas was hurt on?

(Testimony of Neil Wilson.)

A. I don't know the number of the boxcar that Mr. Seamas was hurt on.

Q. So you don't know how far it was on that particular boxcar from the top of the boxcar, do you?

A. I know they are usually located that position in which they show on the diagram.

Q. But you don't know whether it was in that position on this particular car, do you?

A. No, sir, I didn't not make an inspection of the car.

Q. Mr. Wilson, you testified that you can set this handbrake on the side? A. Yes, sir.

Q. And you don't have to climb the brake platform in order to set it? A. No, sir. [284]

Q. Or to release it?

A. You can stand on the side of the car and reach over and get the wheel, and it is a ratchet brake and all you have to do is pull it with one hand. You hold onto the top grabiron with one hand as you pull up, and the chain tightens and automatically locks. When you release it, all you have to do is pull the handle open and the brake wheel spins.

Q. What is the brake platform used for, then?

A. Well, it might be used, if you were going to ride a car a long distance, or wanted to make a join of cars that you didn't want to disturb the contents, you could ride on there and then come down and make a join very carefully.

(Testimony of Neil Wilson.)

Q. Couldn't you do the same thing, sir, by riding on the grabiron?

A. You can either way, yes, sir.

Q. Do these Ajax brakes and the chains and pulleys which they have occasionally stick, Mr. Wilson?

A. Well, they don't very often because all our cars our inspected over at the inspection tracks, and any defects in brakes are immediately handled by the mechanical department.

Q. May I ask you, sir, in your experience as a switchman and in handling this type of Ajax brake, whether it has very often stuck?

A. I don't think I have ever had a failure with an Ajax brake. I have had failures with other brakes, but not the Ajax brake. [285]

Q. Do you recall whether you have ever used the particular type of Ajax brake from the brake platform?

A. Yes, sir, I have used the same kind. There is only one Ajax brake, and the diagram is in the book. It has to be that particular brake to be called an Ajax brake.

Q. In other words, there are several ways of skinning the same cat, isn't that right?

A. I don't know.

Q. You can set and release this particular type brake in a number of ways?

A. That is right. You don't necessarily have to get on the end of the car.

Q. You can do it——

(Testimony of Neil Wilson.)

A. Do it from the side.

Q. You can do it from the top? A. Yes.

Q. And you can do it from the brake platform?

A. If you are so minded you can get on the platform, yes.

Q. On this particular day, Mr. Wilson, you saw Mr. Seamas and Mr. Patterson there at the train station, you stated that they were going to Los Angeles? A. Yes, sir.

Q. Did I understand you correctly?

A. I understood he was coming to the Santa Fe Hospital, and I made arrangements to transport him on the train, and also a [286] permit which would entitle him to ride the Golden Gate train.

Q. Was Mr. Anderson, the Santa Fe claims adjuster, there? A. Yes.

Q. He was? Was anyone else there?

A. Mr. Patterson came down with Mr. Seamas, yes.

Q. Isn't it true, as a matter of fact, Mr. Anderson, the claims agent, did all the talking?

A. He did part of it, true; and I also followed it up because I was interested in Mr. Seamas due to the fact that he is under my jurisdiction as a switchman and I wanted him to have the best attention the Santa Fe could give him, sir.

Q. And from whom had you received the authority to have him hospitalized at the place he desired and sent to the doctor he desired?

A. Who did I have authority?

Q. Yes.

(Testimony of Neil Wilson.)

A. I have the authority from the Santa Fe Railroad. I represent them. I have that authority given to me through my position.

Q. Isn't it true, as a matter of fact, it was Mr. Anderson, the claims agent, that told Mr. Seamas that he could remain in Stockton and continue with Dr. Luckey?

A. Yes, sir, and I also followed it up to tell him the Santa Fe was willing, more than willing, to co-operate.

Mr. Papas: Thank you. [287]

Mr. Cummins: Thank you.

(Witness excused.)

The Court: It is now four o'clock. We will take an adjournment until tomorrow morning at ten o'clock, and I admonish the jury, as I have in the past, not to discuss the case under any conditions or circumstances, and not to form an opinion until the matter is finally submitted to you. I would like to discuss some matters with counsel, briefly. The jury may retire.

(Thereupon, the jury retired from the court-room.)

The Court: Gentlemen, I assume we have reached the end of the evidentiary aspects of the case?

Mr. Cummins: Very close. One more witness.

The Court: You will have rebuttal?

Mr. Papas: I don't think so, your Honor. We

may have a rebuttal witness, depending on the outcome of this witness.

(Discussion between Court and counsel omitted upon request of counsel.)

The Court: All right, we will adjourn until tomorrow at ten o'clock.

(Thereupon, an adjournment was taken until Thursday, October 4, 1951, at 10:00 a.m.) [288]

October 4, 1951—10:00 A.M.

The Court: You may proceed, counsel.

Mr. Cummins: Call Mr. Mahan.

L. E. MAHAN

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

The Witness: L. E. Mahan, 2235 East Alma Street, Stockton, California; switchman and engine foreman.

Direct Examination

By Mr. Cummins:

Q. Mr. Mahan, you are employed by the Santa Fe Railway Company, of course, aren't you?

A. Yes, sir.

Q. You were the engine foreman the night of December 9, 1950, when Mr. Seamas claims he was knocked off a car? A. Yes, sir.

(Testimony of L. E. Mahan.)

Q. What are your duties? Tell the jury what your duties were and are as an engine foreman?

A. Engine foreman's duties is to take care of the work with the switch list and place the cars in the right track that they belong in.

Q. Are the boss of the crew?

A. And I have charge of the whole crew.

Q. In switching service? [289]

A. Switching.

Q. How many years' experience as a switchman have you had?

A. Thirty-five years actual experience.

Q. Now, Mr. Mahan, tell us please, sir, what the duties of a field man are?

A. Well, the field man's duties is to line up switches when he has no cars to ride and set brakes and assist out in the field.

Q. Where does the pin puller work?

A. He works near the engine—be right ahead of me; right ahead of the foreman.

Q. Where does the foreman usually work?

A. Well, he usually works at the end of the cut there to through some of the switches. For instance, that throwing of No. 10 switch there, the foreman generally always throws it.

Q. The field man goes to other points to throw switches?

A. Well, he lines up down the lead when he has a chance, when he is not riding cars.

Q. Mr. Mahan, would you tell us what moves you made with your cut of cars on that night?

(Testimony of L. E. Mahan.)

A. We came out of the rip track with about seven or eight cars.

Q. Then what did you do?

A. First of all I gave Mr. Seamas a list of what tracks these cars was to go to, and also I gave a list to the pin puller each [290] time how many cars to cut off.

Q. Where was Mr. Seamas and where were you when you gave the list to him?

A. We was down there somewhere around the rip track.

Q. Where did you next see Mr. Seamas or notice him?

A. Well, when we pulled up the lead there he dropped off at No. 9 switch and lined it up for No. 9.

Q. Where were you then?

A. I was up there at No. 10 switch.

Q. Then what happened? What went on after that, what moves you made, I mean?

A. We pulled up, I would say three car lengths up over No. 10 switch and I had one car to go to No. 9 and we give it a kick, you know, and it happened it didn't roll in the clear—went down about No. 7 switch and stopped.

Q. All right, now would you tell us, describe for us just what a kick move is?

A. Well, it is a quick move—a speed-up of box-cars, speed them up, you know, to kick them in the clear.

Q. Well, tell us just what process takes place

(Testimony of L. E. Mahan.)

when you make such a kick move? What happens? What goes on?

A. Well, usually the car goes in the clear in the track it is intended to go in.

Q. What does the engine do, I mean, what do you do and what does the pin puller do? [291]

A. He cuts the car off, pulls the pin on it.

Q. Well, do you bump the car hard enough to make it roll two or three hundred feet? How do you make that kick move?

A. We couple into the car and give it another kick the same as I did the first time.

Q. Well, then, to make a kick move you first couple into the car? A. Yes, that is right.

Q. And then what do you do after you have coupled into it? A. We give it another kick.

Q. Give it a push? Does kick and push mean——

A. Well, it is pushing, but it is a little faster than pushing; kicking.

Q. I see. Then does anyone have to uncouple the car?

A. Oh, yes, the pin puller pulls the pin on it.

Q. Now, you told us that you kicked one car to No.—you meant for it to go to No. 9 track but it stopped about No. 7 switch?

A. Somewhere in that neighborhood, yes; didn't clear the other lead.

Q. Then what did you do?

A. I backed up and coupled into it and gave it another kick.

(Testimony of L. E. Mahan.)

Q. Is that second kick the time that Mr. Seamas claims that he was knocked off?

A. After we pulled back up over the 10 track switch in order [292] to put the other cars where they belong, I had to pull back up over No. 10 track switch and he told me that it knocked him off.

Q. All right. Did you kick a second car down against that first car? A. No, sir.

Q. After you saw Mr. Seamas at No. 9 switch when did you next talk to him, or when did he next talk to you?

A. At the time he told me that I knocked him off the car.

Q. Did you see or did he approach you, say anything to you? A. No, sir.

Q. Anywhere here in the vicinity of No. 9?

A. No, sir, he did not.

Q. Pardon me—of this one car anytime during that interval? A. No, sir, he did not.

Q. Didn't say anything to you?

A. No, sir, I didn't see him.

Q. Did you say anything to him?

A. No, sir.

Q. Did you give him permission to get up on either one car or two cars sitting here where they show on the map?

A. No, sir, I did not, and I wouldn't even have let him got up there if I had known it.

Q. If he had asked you for permission to get up and release the brake on the car sitting here at

(Testimony of L. E. Mahan.)

the point marked No. 1 car [293] on an Exhibit 3, would you have given him permission to do it?

A. I would have told that it wouldn't have been necessary because we was already down over the switch where we had to slack ahead anyway and I might as well just kick it in there with the brake on it, if it had one on it.

Q. Why is that so?

A. It is not necessary for a man to have to get up there in that case.

Q. Tell us why it isn't necessary.

A. Well, because I could have got the car in the clear with the brake on it, but it undoubtedly didn't have very much of a brake on it, because I would have noticed it when I pulled—when it pulled by me.

Q. How would you have noticed it?

A. I would have heard the brakes squeaking or probably the wheels sliding if it was on there real tight.

Q. Now, did you give Mr. Seamas any instructions as to what to do after he threw this No. 9 switch? A. I beg your pardon?

Q. Well, after Mr. Seamas threw this No. 9 switch what were his instructions? What was he supposed to do?

A. Well, he had a list of the other tracks we was going to use over on the other side there. I really don't know which it was, but he went over there, I supposed, to line those switches up. [294]

Q. Did you tell him to do that?

(Testimony of L. E. Mahan.)

A. Well, that is his job. He had the dope—had the switch list there.

Q. As field man, it was his job to do what?

A. When it is possible for him to, yes.

Q. To do what over where?

A. Line up over on the other lead.

Q. By the "other lead" what lead are you referring to?

A. That three and four, five track; that lead.

Q. These other tracks then, three, four, and five, where you were going to put other cars?

A. Yes.

Q. When you made that second kick move to push this car on into No. 9 track, did you know where Mr. Seamas was? A. No, sir, I did not.

Q. Where did you think that he was?

A. I just supposed he was over on the lead there. I didn't dream of him being on the car.

Q. Did you see any light? A. No, sir.

Q. Did you see any reflection of a light?

A. No, sir.

Q. Of a lantern? A. No, sir.

Q. Mr. Mahan, on which side of a cut of cars such as you [295] were working with that night at Stockton, in the Stockton Yards, do you as an engine foreman and switchman usually and customarily work?

A. We all customarily work on the same side, but in this case I suppose he was lining up switches over there.

Q. Which side would the same side be at Stockton Yards? A. South side of the track.

(Testimony of L. E. Mahan.)

Q. What is the purpose in working on the south side of the tracks customarily?

A. Well, everybody see one another and you work with the engineer.

Q. Do you have to pass signals to the engineer?

A. Yes, sir.

Q. Does he have to be able to see you to do that switching work? A. Yes, he can see you.

Q. Under what circumstances, if any, would it be permissible for Mr. Seamas as a switchman to climb on the train on the north side of the track as there at Stockton?

A. Well, it seems to me that a man of his experience should have known what he was going to do and realized he was going to couple into that car and not take the chance.

Q. Well, that is not what I asked you, Mr. Mahan. Is he permitted to climb onto the train on the north side of the cut of cars? [296]

A. I suppose, if he didn't get on the south side.

Q. Sir?

A. If he didn't get on the south side he was bound to have got on on the north side, if he got on.

Q. Is he permitted without permission from you to get on the north side of the cars?

A. Well, not necessarily. He got on there at his own risk.

Q. Did you give him permission to get on?

A. I did not. I didn't tell him to.

Q. Did you know that he was going to get on?

(Testimony of L. E. Mahan.)

A. No, sir.

Q. If you had known that he was climbing on on the other side of the train, on the north side of the train, would your actions have been any different?

A. It would have been all different. I wouldn't have hit it until I had known that he was in a safe place.

Q. You wouldn't have what?

A. I wouldn't hit the car until I knew that he was in a safe place.

Q. By the way, are there any lights in that Mormon Yard? A. Pardon?

Q. Are there any lights in that Mormon Yard?

A. There is one light up there, yes, sir.

Q. Where is it?

A. Right there opposite to where the accident happened. Right [297] there at the switch shanty.

Q. How high is that light?

A. Oh, I imagine it is fifty foot high.

Q. Well, is it a little tiny bulb or a big bulb? Can you tell us about that?

A. It is a pretty good light, makes a nice light up there.

Q. Does it shine for some distance?

A. Sir?

Q. Does it shine for some distance?

A. Well, I would say four or five cars.

Q. Point out to us, Mr. Mahan, if you will please sir, just where that light is.

(Testimony of L. E. Mahan.)

A. Well, it is—I would say fifteen foot west of the switch shanty which is on that map.

Q. Fifteen feet to the west (indicating)?

A. That is right.

Q. Where is it in relation to this No. 10 track?

A. Where is what?

Q. Where is in relation to this No. 10 track? Is it north or south?

A. Oh, No. 10 track. It is south.

Q. How far south?

A. Oh, I would say 15, 20 foot.

Q. Can you tell us what signals you gave to make this move to shove the car on into No. 9 track? [298]

A. Well, when I seen the car didn't go to clear I gave him a back-up signal, easy back-up signal, easy signal to couple into the car. Then I intended to kick it in there as I did when I coupled in.

Q. Did you couple into it? A. Yes, sir.

Q. Then what happened?

A. Well, we kicked it in the clear, No. 9 track.

Q. Did you pull the pin?

A. I didn't. The pin puller did.

Q. How far was he from you when the car—when the cut of cars coupled into the car? How far was the pin puller from you?

A. I walked down to the end of it myself when I seen it didn't go to clear. I walked down to the end of the car and seen that the boy made the coupling and pulled the pin.

Q. How many feet, if you can give it in a matter of feet, was the pin puller from you?

(Testimony of L. E. Mahan.)

A. Well, I suppose 10 foot. I imagine 10 foot.

Q. What signals, if any, were given to the engineer during that move?

A. After I coupled into the car?

Q. No, before you coupled into the car.

A. I give him an easy back-up signal.

Q. Would you mind demonstrating what an easy back-up signal is? [299]

A. (Witness demonstrating): Easy back-up signal.

Q. Now, did you give him any other signal?

A. I gave him—no—I gave him a stop signal, yes.

Q. When did you give him the stop signal?

A. When he got to the car. When he hit the car.

Q. Are you familiar with the rules of the company with respect to how fast you are permitted to couple into a car?

A. Well, you should use judgment coupling into a car and couple into it easy as you can. Of course, sometimes you can't avoid making a rough coupling.

Q. How fast did you couple into this car? How fast where you going?

A. Oh, I would judge between two and a half and three miles an hour.

Q. Did you do any damage to the car?

A. No, sir.

Q. All right, Mr. Mahan. After the accident is supposed to have taken place you talked with Mr. Seamas, you have told us, is that right?

A. Yes, sir.

(Testimony of L. E. Mahan.)

Q. Where were you when you had that conversation with Mr. Seamas?

A. Well, right there where the accident occurred he said, where the car was. He showed me a skinned place on his leg where he said he got knocked off; got a scratch. [300]

Q. Tell me about that skinned place or scratch? What did it look like?

A. Oh, just a minor scratch.

Q. Was it bleeding?

A. No, I don't think so.

Q. Did you see any blood?

A. I didn't see no blood. I don't recall seeing any.

Q. Did you see anything else, or did he show you anything else, any scratches, abrasions, bruises, anything? A. I don't remember if he did.

Q. Did he tell you anything about his back being hurt? A. No, sir.

Q. At any time that evening? A. No, sir.

Q. Did he do any work after this is supposed to have taken place?

A. Well, we worked about—I imagine fifteen, twenty minutes. Then we went and tied in.

Q. Did you notice any difference in his activity after this accident is supposed to have taken place?

A. No, I didn't really—I didn't think his injury amounted to anything and I didn't think nothing of it.

Q. Did you go to the switchman's shanty after you tied up?

(Testimony of L. E. Mahan.)

A. Well, I went down and put my lantern up, yes, sir.

Q. Were you down there with all of the crew?

A. No, sir. [301]

Q. Did Mr. Seamas make any statement to you while you were down there?

A. I don't recall seeing him there at all.

Q. Do you recall any statement that he made about an injury or an accident there?

A. No.

Mr. Cummins: Cross-examination.

Cross-Examination

By Mr. Michael:

Q. Mr. Mahan, you stated there was a light which was located near the shanty?

A. Yes, sir.

Q. That light is there at the present time, isn't that correct? A. That is right.

Q. And it is also correct that that light was not there at the time that Mr. Seamas was injured, isn't that correct?

A. I wouldn't—I couldn't say.

Q. You don't know? A. I couldn't say.

Q. Then all your testimony a while ago about that light you are not sure of, is that correct?

A. There is a light there now is all that I can say.

Q. There is a light there now?

A. And I couldn't say when it was installed.

(Testimony of L. E. Mahan.)

Q. You don't know whether that light was there on December [302] 9th of last year, do you?

A. Well, I am not sure.

Q. You are not sure? A. No, sir.

Q. Now, is it your testimony that you didn't hear Mr. Seamas tell you at any time not to throw a switch or not to kick those cars?

A. Beg your pardon?

Q. I say, is it your testimony that you didn't hear Mr. Seamas say to you not to throw a switch or not to kick the cars?

A. No, sir, he did not.

Q. Can you hear all right?

A. Well, I can hear, yes.

Q. Don't you have trouble hearing in one of your ears? A. No, sir, I don't.

Q. Do you hear all right in your right ear?

A. Yes, sir.

Q. And you hear all right in your left ear?

A. Yes, sir.

Q. You have never had any impairment of hearing? A. Any what?

Q. Any impairment of hearing?

A. No, sir.

Q. You are quite sure of that? [303]

A. I don't understand the question.

Q. I mean, do you have any trouble hearing out of any ear?

A. Not particularly, no. I have never been turned down with the company.

Q. Now, Mr. Mahan, you stated that the field

(Testimony of L. E. Mahan.)

man should always work in sight of the foreman or the engineer, is that right?

A. That is right.

Mr. Cummins: No, he did not say any such thing.

Mr. Michael: Well, I am sorry.

The Court: You might ask him what he did say. What did you say, Mr. Witness?

The Witness: What?

The Court: Do you hear me now? Counsel asked you—repeat the question, please.

Q. (By Mr. Michael): Mr. Mahan, if I am wrong, please correct me——

The Court: Ask him what he said.

Q. (By Mr. Michael): What did you state with reference as to where the field man should work as far as the engine is located?

A. I stated what?

Q. You spoke of the particular place where the field man should work? A. Well, yes.

Q. Now, would you just repeat that, please? What did you say? [304]

A. Well, his duties is to assist and line up switches as far as he can, and if he is not busy riding cars, setting brakes his duties are to help the foreman line up the switches on the lead and anywhere that might be necessary.

Q. And in this work did you state that he is supposed to work on any particular side of the engine?

(Testimony of L. E. Mahan.)

A. Well, in case he is going to get on cars, that is the only time.

Mr. Cummins: What was that?

(Answer read by the reporter.)

Q. (By Mr. Michael): Mr. Mahan, you stated that the first or the most westerly car on the train was to go into track No. 9, is that correct?

A. That is correct, yes, sir.

Q. And you stated that you kicked one car?

A. One car.

Q. And that this car did not reach track No. 9 but stalled or came to a rest opposite switch stand No. 7? A. That is right.

Q. Then you stated that you gave a back-up signal and the train went into this car?

A. Yes, sir.

Q. And that pushed the car into track No. 9?

A. After I got coupled into it I give her another kick and kicked it in the clear, No. 9. [305]

Q. Then the next move of the train was what?

A. The rest of it?

Q. Yes, where did the train go then?

A. In various tracks, and I can't recall what tracks all they went to.

Q. Do you recall whether the train went in track No. 9? A. Sir?

Q. Isn't it true that after this car or these cars were kicked and they went into track No. 9——

A. Yes.

Q. (Continuing): ——that the train then followed those cars into track No. 9?

(Testimony of L. E. Mahan.)

A. No, sir. I had to go back up over the 10 switch again.

Q. And it is your testimony that the train came to a stop here (indicating) and then went back up to the tail track?

A. Up the tail track over 10 switch, that is right.

Q. Do you recall where the various cars were to go on that evening that you had on this train, Mr. Mahan? A. How many cars?

Q. Do you recall where they were to go?

A. No, sir, I can't.

Q. You don't remember? A. No, sir.

Q. You just know that one was to go into No. 9 track? A. I did that. [306]

Q. But they were to go throughout the yard, is that correct? A. That is right.

Q. And who was to align the switches?

A. Well, as far as—if Joe wasn't riding cars, he was supposed to line them.

Q. Do you recall which switches he aligned?

A. No, sir, I can't.

Q. Do you recall in what general area he was working at that time?

A. He was over on the north lead there, I will say four, five, or six switch, up in there somewhere—or maybe three switch, I don't know.

Q. And you don't know, then, what switches he was to check? A. No, sir, I do not.

Q. Then you didn't exactly know where Mr. Seamas was with respect to the field, did you?

(Testimony of L. E. Mahan.)

A. No, I didn't know where he was.

Q. You didn't know whether he was here, whether he was here or whether he was here (indicating), did you?

A. Well, if he had been up there at No. 10 switch, I couldn't have kept from seeing him.

Q. But you didn't know where he was located?

A. No, sir, I didn't.

Q. As far as you were concerned he could have been anywhere in this general area, isn't that correct? [307]

A. I suppose so. I didn't see him.

Q. But you did know he was in the vicinity of the car in the train? A. At what?

Q. You did know he was in the vicinity of the train though, isn't that correct, and the cars?

A. I supposed he was over on the lead probably 30, 40 foot away from the cars.

Q. But you stated you didn't see him?

A. No, sir, I did not until after the accident.

Q. Mr. Mahan, railroad equipment is heavy equipment, isn't it? It is big equipment, isn't it?

A. Sir?

Q. Railroad equipment is big equipment, isn't it? A. Big equipment, yes.

Q. And it is heavy equipment, isn't it?

A. That is right.

Q. And you have been working for a railroad for a long time, haven't you, Mr. Mahan?

A. Quite a while.

(Testimony of L. E. Mahan.)

Q. How many years?

A. Thirty-five actual years.

Q. And how old are you, Mr. Mahan?

A. I am sixty-five years old.

Q. How many different railroads have you worked for? [308]

A. I have worked for three.

Q. Three different railroads? A. Yes, sir.

Q. And you have worked for railroads throughout the United States, haven't you?

A. Well, not over too many states, no.

Q. You have worked for railroads which travel all over the United States? A. Oh, yes.

Q. Now, there is a shanty, isn't there, Mr. Mahan, which is located opposite this switch No. 7?

A. Yes.

Q. Have you been in that shanty very many times? A. Get that what?

Q. Have you been in that shanty very many times? A. Been in it, yes.

Q. Do you know what is inside that shanty?

A. Well, yes, I think I do.

Q. And against one wall there is posted a set of rules about that high (indicating), isn't that correct?

A. No, I don't recall ever seeing them rules in there.

Q. You have never seen a black card about the size of this board and about this wide (indicating) which is right on the wall as you walk out of the

(Testimony of L. E. Mahan.)

shanty and it is white and it has got black letters on it? You have never seen that? [309]

A. No, sir, I never did.

Q. You have never read those rules on that black card, is that correct?

A. I have never seen those rules.

Q. Do you know what this book is, Mr. Mahan?

A. Yes.

Q. What is it? A. That is a rule book.

Q. It is a rule book? A. Yes, sir.

Q. And the rules in this book govern your action, isn't that correct? A. I suppose so.

Q. Now, Mr. Mahan, isn't there a rule in this book which applies not only to the Santa Fe Railroad, but to every railroad to the effect that you——

Mr. Cummins: Objection. The book itself is the best evidence.

The Court: You might ask him about the rule in a general way. You can specify the particular rule that you have in mind.

Q. (By Mr. Michael): Mr. Mahan, I am speaking of Rule 818 and 820a and 820c. Are you acquainted with those rules?

A. I have read them, but I am not too familiar with them right at present. [310]

Q. Would you like to refresh your memory?

A. Yes, sir.

(Counsel hands Rules Book to Witness.)

Q. (By Mr. Michael): Isn't the effect of these rules to state to you in other words that you are

(Testimony of L. A. Mahan.)

not to move that heavy equipment unless you are sure that you can move it without doing injury to any person?

Mr. Cummins: Objection. It does not state the law of the land under the Federal Employees Liability Act. Immaterial, incompetent, and irrelevant.

The Court: Sustain the objection, Counsel. What specifically have you in mind on the rule? What is the text of the rule?

Mr. Michael: The text of the rule, your Honor, is that the train should not be moved.

The Court: Would you read the rule?

Mr. Michael: Yes, your Honor. Rule 818: "During heavy fog, snow, dust storms, or other conditions which impair vision and when signal aspects are not readily discernible it shall be the duty of the engineman, conductors, and engine foreman to regulate the speed of their train or engine sufficiently to insure safety and under these conditions whistle must be frequently sounded. Extra precautions for protection must be taken."

The Court: Does that apply to a switching enterprise or a switching operation? [311]

Mr. Michael: Your Honor, this is in the section under train and yard service, and if I am not mistaken that applies to switching. The other rule, your Honor, is 820.

The Court: Are you familiar with that rule, Mr. Witness?

The Witness: I have read it, yes, sir.

(Testimony of L. A. Mahan.)

Mr. Michael: Would you like to hear Rule 820, your Honor?

The Court: Yes.

Mr. Michael: "In switching cars the following must be observed.

"(a) Warn persons in, on, or about cars, before coupling to or moving them to avoid personal injury or damage to equipment or laden," and

"(c) Cars must not be shoved without first taking proper safeguards to avoid accident."

Mr. Cummins: Your Honor, I am going to object to the reading of these Rules before this jury which is tantamount to placing them in evidence without an opportunity to object to them. I am going to object further on the ground that these Rules are rules of the Santa Fe Railroad to insure safety beyond the rule of ordinary care which the Federal Employers Liability Act lays down as the standard of care for the Santa Fe Railroad to follow, and that we have gone beyond the rule of the statute and attempted by the rules and practices to insure safety, but we have no such standard of care.

The Court: Well, Counsel, you can argue that at an [312] appropriate time. My province now is to rule on the admissibility of the particular rules, and counsel is entitled to examine the witness concerning his knowledge of a particular rule if it has an application to the controversy. Now, the second rule that you referred to, I think has without doubt a bearing upon the particular facts in question. With respect to the first rule referred to, I can't

(Testimony of L. A. Mahan.)

see its immediate application, Counsel. Accordingly, I shall strike the same from the record and the jury is entitled to disregard the same. However, the second rule, I believe, is applicable. I can't see any reason for the blowing of whistles in a situation like this with respect to a switching operation.

Mr. Michael: Well, your Honor, it just speaks of during fog or snow, whenever conditions are such that the vision is impaired. It states that "the movement of the train should be regulated in its speed to insure safety," and then it says, "extra precautions for protection must be taken"; that is the only thing I had in mind.

Mr. Cummins: There is no evidence in this case that vision was impaired. Plaintiff's own witness says that he had two lanterns in sight at all times.

The Court: Yes, I will sustain the objection as to the first rule. The second rule, however, has a direct application. Reference may be made to it, and the witness may be examined thereon. The question inclement weather, if the jury [313] believes it to be inclement, or the fog conditions are circumstances that they may take into consideration in connection with the operations of the switching by this man and his crew. All right.

Mr. Michael: Thank you, your Honor.

The Court: Was your vision impaired on this particular night? Could you see?

The Witness: Yes, sir; it was a light fog, but I could see, oh, I would say 10, 15 car lengths.

(Testimony of L. A. Mahan.)

The Court: Was a lantern visible to you?

The Witness: Yes, sir; oh, yes. There wasn't no chance to take. It wasn't so foggy there was any doubt of any accident.

Mr. Cummins: Will you speak up, please?

The Court: You might examine him on the second rule that you have reference to.

Q. (By Mr. Michael): Mr. Mahan, are you acquainted with that second rule which is 820 a and c? A. I think so.

Q. Do you remember which one I am referring to? I don't want to confuse you. A. 820.

Q. A and c. Mr. Mahan, you stated that you didn't know where Mr. Seamas was; isn't that right? A. That is right; yes, sir.

Q. But you knew he was working in the general area? [314] A. Yes, sir.

Q. As far as you were concerned, he could have been working pretty close to those trains; isn't that right? A. Well, there wasn't no need of it.

Q. Well, wasn't he aligning switches all up and down this lead track?

A. Down that track and I was on the other lead.

Q. Then it could have been possible he could have been right in the vicinity of these cars if you were aligning this switch to this switching (indicating)?

A. I don't know why he would be up there.

Q. If he was going to kick cars from these tracks into the various tracks he would be up here (indicating), wouldn't he?

(Testimony of L. A. Mahan.)

A. I don't know which ones, but——

Q. You don't know which ones?

A. No, sir, I don't recall.

Q. Wouldn't it have been proper under this rule to have determined his position before you kicked that car to find out where he was?

A. No, sir, I wouldn't consider it would be in a switching operation of that nature.

Q. Even though you didn't know where he was?

A. I knew where—I knew where he was supposed to be.

Q. You knew he was supposed to be over there in the general [315] area?

A. He was supposed to be on the lead, lining up.

Q. But you didn't know where?

A. No, sir, I didn't know where.

Q. Mr. Mahan, when you have a train that has some cars on this tail track—— A. Yes, sir.

Q. (Continuing): ——and you have another car located at another section of the track, for example in this particular spot here marked one by track—by track No. 7, and you want to back into that train the first signal you give is a back-up signal to the engineer; isn't that correct?

A. I gave him an easy back-up signal; yes, sir.

Q. Now, isn't it proper as you approach this car here, you give him another signal to slow down?

A. Yes, sir.

Q. And ease in, gradually into this car or these cars; isn't that right? A. Yes.

Q. And as he approaches this car here (indi-

(Testimony of L. A. Mahan.)

cating), you may even bring him to a stop and then gradually bring him in to couple into the cars?

A. Yes, sir.

Q. You have testified, have you not, that you gave him a back-up signal? [316]

A. That is right.

Q. And you gave him a stop signal?

A. I give him a signal when he got just near the car. He was going, I thought, just a little bit fast.

Q. Did you give him a stop signal before you hit the car or after you hit the car, Mr. Mahan?

A. Before.

Q. Before? A. I am sure, yes.

Q. Did you hear the testimony of the engineer in Court yesterday, Mr. Strain? A. No, sir.

Mr. Michael: No other questions, your Honor.

Redirect Examination

By Mr. Cummins:

Q. Mr. Mahan, if I understood you correctly, during the cross-examination you said it is permissible—rather that you would expect the person to get on on the engineer's side if he was going to get on a car; is that correct?

A. That is right, or notify me otherwise.

Q. If he was not going to get on the car on the engineer's side, he is what—to notify you?

A. Knowing the move I was going to make. He knew I was going to couple into the car.

(Testimony of L. A. Mahan.)

Q. Now, if Mr. Seamas had got on the car for the purpose of releasing the brake on the engineer's side, what route to the [317] brake would he have taken?

A. He would have got up on the east end of the car and walked over the top, as I understand the brake is on the west end, he would have had to walk to the west end of the car.

Q. Would he have been within your sight had he done that? A. Pardon?

Q. Would he have been within your sight—I should say, would his lantern have been within your sight had he done that? A. Yes.

Mr. Cummins: That is all.

Mr. Michael: No further questions.

The Court: One question. Mr. Seamas, the plaintiff, showed you some abrasions or scratches on his legs?

The Witness: Yes, sir.

The Court: Now, when did he show those abrasions?

The Witness: Well, right after the accident, just a few minutes.

The Court: How do you know it was right after the accident?

The Witness: Well, because he was there when we pulled up over that 10 switch, he was out there by where that car was.

The Court: He was out there where the car was?

The Witness: Where that car was that we kicked in No. 9 track.

(Testimony of L. A. Mahan.)

The Court: All right. Now, what did he do? Did he pull [318] up his pants leg and show you?

The Witness: Yes, sir, he did.

The Court: Were his pants ripped?

The Witness: I didn't know, sir.

The Court: And tell me about the abrasions. Describe them for me.

The Witness: The scratch, you mean?

The Court: Yes.

The Witness: Well, I suppose it was somewhere on the leg up here (indicating), probably an inch long, a little scratch; just a small scratch.

The Court: On both legs?

The Witness: No, just one leg.

The Court: What did he say to you when he showed you the scratch?

The Witness: He said, "You knocked me off the car."

The Court: He said to you, "You knocked me off the car"?

The Witness: Yes, sir.

The Court: What did you say to him?

The Witness: Well, I don't recall what I did say to him.

The Court: Well, what did you say? It is important now that you do recall what you said to him.

The Witness: I just didn't say—only I says—I might have said "I am sorry."

The Court: What did you say to him at the time he showed [319] you the scratch?

(Testimony of L. A. Mahan.)

The Witness: Judge, I just remember what——

The Court: Did you say you were sorry?

The Witness: I might have. In fact, I was sorry.

The Court: Why were you sorry?

The Witness: I am sorry if I hurt anybody.

The Court: You have testified that you can't remember any conversation that you had in the shanty?

The Witness: No, sir, I do not, and I don't recall—I don't think he was there. I don't think that I seen him there.

The Court: Did you give a statement to the Company concerning this accident?

The Witness: Yes, sir.

The Court: Do you have a copy of that statement?

Mr. Cummins: It may go in evidence, your Honor. I have a copy of it and I will be happy to read it.

The Court: May I see it before it goes in evidence?

(Counsel hands the Court copy of statement.)

Mr. Cummins: If the Court please, in view of your Honor's questions to this witness, in all fairness I believe your Honor should now read the statement, and I request it.

The Court: I haven't finished reading it, Counsel. When I complete reading it, I will show it to counsel for the plaintiff. Have you examined the statement?

(Testimony of L. A. Mahan.)

Mr. Michael: No, your Honor. [320]

The Court: Will you show this to counsel for the plaintiff and we will take the morning recess. The same admonition to you ladies and gentlemen of the jury not to discuss the case under any conditions or circumstances, not to form an opinion until the matter is finally submitted to you. We will take the recess.

(Short recess.)

Mr. Cummins: Your Honor, it occurred to me that I might possibly have not made a complete disclosure. I have consequently handed counsel the 1428 report made by this witness approximately three days—depending on my memory now——

The Court: I appreciate your being forthright, Counsel, and I will say to the ladies and gentlemen of the jury that in connection with my interrogating any witness thus far or this particular witness, it is not the desire of the Court to create any inference in the minds of the jury that I have a feeling one way or the other about this man's honesty, or his integrity; nor have I any opinion concerning the weight of the evidence, nor his testimony in general. My only thought was—and I believe it to be the duty of the Judge—to elicit the facts which may be obscure in his mind as well as in the jury's mind. In addition to that, to determine whether or not pre-trial procedures have been engaged in. Usually, at a trial of this nature there is an interchange by and between counsel in

(Testimony of L. A. Mahan.)

advance of the trial of all statements given by the employees of a [321] railroad company. That is called a pre-trial procedure. Now, it isn't necessary for me to engage in any discussion with the jury concerning the technique of trying a case, but I merely want a determination in this controversy of any and all statements which may have been taken by either side to the end that there be a full, fair, and complete disclosure of all of the facts.

Now, whether that request be made of the plaintiff or the defendant is of no concern to me, and I certainly did not intend to reflect upon Mr. Cummins or Mr. Baraty, nor upon plaintiff's counsel. My avowed intention was and is merely to have a full, fair and complete disclosure.

Now, so much for that, and I trust the jury understands. As I may have indicated earlier in the case, I think that I asked counsel at one recess to exchange several statements. Mr. Cummins did. He indicated to counsel that he had statements, and I think they examined them. Now, I did not know whether they had seen any statement given by this man. All they have to do in advance of trial is make a demand and the Court will make an appropriate order to that extent. Usually upon demand the railroad counsel supplies statements to plaintiff's counsel without further adieu. I do not intend to try the case for either counsel, defendant or plaintiff. It isn't my province. With respect to the statements, if plaintiff's counsel desire to examine thereon they may do so and they are

(Testimony of L. A. Mahan.)

privileged to do so if [322] they believe any matter is relevant. So far as my offering any statement in the record, I do not intend to do so, because I think I would be transgressing the ordinary province of a trial judge. I think I have made myself clear.

Mr. Michael: Yes, your Honor. Your Honor, in view of that fact that there is a statement made by Mr. Mahan, I will ask the Court for this opportunity to recross-examine Mr. Mahan on that statement.

The Court: All right. You may cross-examine.

Recross-Examination

By Mr. Michael:

Q. Mr. Mahan, do you recall making a statement to J. R. Anderson at—it says Mormon, California, but I guess it means the Mormon Yard in Stockton, on January 3, 1951? A. Yes, sir.

Q. Would you like to refresh your memory on that statement? A. How's that?

Q. Would you like to refresh your memory by reading this statement? A. I think so.

(Counsel hands witness statement.)

Q. (By Mr. Michael): Now, in this statement, Mr. Mahan, you state "field man Seamas"——

Mr. Cummins: Just a moment. If you are going to read the statement I think it should first be identified and offered [323] in evidence, your Honor.

Mr. Michael: I am sorry.

(Testimony of L. A. Mahan.)

The Court: Well, he is entitled to examine with respect to statements made in writing by the defendant heretofore. He need not examine on all of the statement. Counsel on the other side may take up other matters in the light of any developments made here.

Mr. Cummins: Very well.

The Court: Go ahead.

Q. (By Mr. Michael): Mr. Mahan, you state "evidently car had a brake slightly set which did not permit it rolling in the clear." Now, wasn't it your statement a little earlier that if there were a brake on that car you would have noticed it?

A. I said if it was a brake that would amount to anything.

Q. And you feel that a brake which was tightened sufficiently not to permit a car to roll in the clear did not amount to anything?

A. Well, it happened to be an empty car and it doesn't take a very tight brake to slow one of them down.

Q. Now, you state, "field man Seamas was on the opposite side of the cut and I did not see him at any time or did I know that he was injured until about ten minutes after this move was made and we were in the yard office and tied up when he showed me a very slight cut on his leg and did not request any report to be made." [324]

A. Well, he showed me this—that is wrong there.

Q. This is wrong?

(Testimony of L. A. Mahan.)

A. He showed me the scratch up there in the yard, yes, sir.

Q. Then this statement is wrong?

A. Well, that part of it is.

Q. That part of it? You continue, "He made no explanation of how he got the scratch on his leg, made very light of it." Is that correct?

A. He what?

Q. "He made no explanation of how he got the scratch on his leg."

A. Well, he did. He told me that.

Q. And this part of the statement is wrong also?

A. That cut that out.

The Court: What was the answer, please?

The Witness: I said that that part of that statement is wrong because he told me up there in the west end where the accident happened that he got knocked off and scratched his leg.

Q. (By Mr. Michael): "It is the day after accident I learned of the alleged back injury."

A. That is right.

Q. That is correct. The next day you did learn, then, he had hurt his back; is that correct?

A. That is what I was told.

Q. Yes, that is what I mean.

A. Yes, sir. [325]

Q. "I knew none of the details of how alleged accident occurred until January 2, 1951." Is that correct? A. No, sir.

The Court: What was the answer?

The Witness: No, sir, that wasn't correct.

(Testimony of L. A. Mahan.)

The Court: What is incorrect?

The Witness: Incorrect, yes, sir.

Q. (By Mr. Michael): "We came against this car pretty hard, hard enough to knock a man off if he did not have a good hold."

A. That is right, three miles an hour will knock a man off if he hasn't got a good hold.

Q. Wasn't your testimony, a little earlier, that before you ran into this car you gave a stop sign?

A. Well, stop sign and it coupled up, and I judge it hit about two and a half or three miles an hour—stopped probably ten foot away.

Q. Probably ten foot away and then you backed in? A. Probably so, yes, sir.

Q. "And I had no idea he was on this car when we went against it, and if he was on it I only have his word for it being a fact, and I did not learn he was on it until January 2, 1951."

A. That is wrong. [326]

Q. That is also wrong. "The night was dark, foggy and damp"; is that correct?

A. It was foggy. I could see, though. It was after dark, but it wasn't so dark I couldn't see.

Q. Mr. Mahan, who typed up this statement?

A. I don't know.

Q. You don't recall?

A. Mr. Anderson, I suppose.

Q. Did he type it up in your presence?

A. No.

Q. He did not? A. I don't think so.

Q. Did you read it before you signed it?

(Testimony of L. A. Mahan.)

A. I suppose I did.

Q. You don't recall whether you did or not?

A. Yes, I read it.

Q. And is this your handwriting?

A. Yes, sir.

Q. And your signature? A. Yes, sir.

Q. Where it says, "I have read the above statement and find it correct, L. A. Mahan; witness, J. R. Anderson." Is this statement word for word, a word for word statement that you gave Mr. Anderson?

A. Well, I couldn't recall. I suppose it is. [327]

Mr. Michael: No further questions, your Honor.

Redirect Examination

By Mr. Cummins:

Q. This statement begins, "Statement of L. A. Mahan, made to J. R. Anderson, at Mormon, California." Is that correct or not correct?

A. That is correct.

Q. "On the 3rd day of January, 1951." Is that correct? A. About that time.

Q. "I am 64 years of age and have worked for the Santa Fe Railway Company about nine years, and 13 years on the G.C." Is that correct or incorrect? A. Yes, sir.

Q. "On December 9, 1950, I was foreman in charge of yard engine No. 2351 at time of accident or alleged accident to J. J. Seamas." Is that correct? A. Yes.

(Testimony of L. A. Mahan.)

Q. "We had pulled the rip track and had the rear car of the cut to put into No. 9 track." Is that correct or incorrect? A. Right.

Q. Is this your own interlineation, your own handwriting, here after the word "car": "of the cut to put into No. 9 track"?

A. That is my writing, yes, sir.

Q. "We had kicked this car toward No. 9 and it stopped, so to [328] put it in the clear I had to go against it again with the engine and about six cars to get it in the clear." Is that correct or incorrect? A. That is correct.

Q. You mentioned just one car here, "this car." Did you have one car or more than one car?

A. No, one went to No. 9.

Q. "Evidently car had a brake slightly set which did not permit it rolling in the clear." Is that correct? A. That is correct.

Q. "The pin puller, after we came against the car, pulled the pin"—— Is that correct?

A. That is correct.

Q. "I gave a kick sign to the engineer." Did you do that? A. Yes.

Q. "Field man Seamas was on the opposite side of the cut and I did not see him at any time, nor did I know that he was injured until about ten minutes after this move was made"—— Is that incorrect? What part of that is incorrect, if any part of it? A. Read the question again?

Q. Yes. "Field man Seamas was on the opposite side of the cut"—— Is that correct, you say?

(Testimony of L. A. Mahan.)

A. That is correct.

Q. "——and I did not see him at any time"—— What did you mean [329] by that?

A. At any time after he left No. 9 switch until I talked to him after the accident.

Q. All right. "——or did I know that he was injured until about ten minutes after this move was made"—— Is that correct or incorrect?

A. I won't say. Could vary a little bit, the minutes part.

Q. How many minutes afterward was it that you saw him?

A. Oh, just a few minutes. Not long. I walked back on 10 switch, I think, to where he was.

Q. "——and we were in the yard office"——

A. No, sir, we wasn't in the yard office.

Q. Did you go to the yard office?

A. We went to the yard office, but afterwards.

Q. "——and tied up, when he showed me a very slight cut on his leg"—— Is that correct, he showed you a very slight cut on his leg?

A. He showed me that up at the east end of the yard.

Q. Did he show that to you again at the yard office?

A. No, I did not see him at the yard office.

Q. "——and did not request any report to be made and did not complain of any back injury." Did he? A. No.

Q. "The scratch on his leg was the only complaint." Is that [330] true or false?

(Testimony of L. E. Mahan.)

A. That is true.

Q. "He made no explanation of how he got the scratch on his leg." Is that true or false?

A. True.

Q. What did he tell you?

A. That is all he told me, said he got knocked off the car, and showed me a scratch.

Q. "——made very light of it"—— What did you mean by that?

A. Well, I didn't think much of it. Didn't think it amounted to anything.

Q. "——and the scratch appeared to me to be of such a minor nature and so inconsequential that I thought it would not require a report"—— Is that correct or incorrect? A. That is right.

Q. "——and as the man did not complain about a back injury, no matter how slight, and had no other complaints, I did not make out any reports for three days." Is that correct or incorrect?

A. That is correct.

Q. "It was the day after accident I learned of the alleged back injury." Is that correct?

A. That is correct.

Q. "I knew none of the details of how alleged accident occurred until January 22, 1951." Is that correct or incorrect? [331]

A. That is incorrect.

Q. Why is that incorrect and how is that incorrect?

A. I knew of the accident at the time it happened; that is, right afterwards.

(Testimony of L. E. Mahan.)

Q. Did you know the details of it?

A. All I knew, he said he got knocked off the car, is all.

Q. Did you learn more details later?

A. No, sir.

Q. From anybody? A. No.

Q. "——when Seamas came to me, wanted me to sign a lot of papers,"—— What about that? What happened? A. That is the reason——

Q. What happened there?

A. He came over to my house, and he said someone wanted me to sign some papers.

Q. What happened? Did you sign them?

A. No, I couldn't afford to sign them.

Q. Why didn't you sign it?

A. I didn't think I had a right to sign it.

Q. Did you read what he wanted you to sign?

A. No, he didn't offer to let me read it.

Q. He didn't offer to let you read it?

A. No.

Q. "——had another man with him"—— Do you know who that was? [332]

A. No.

Q. Was it one of these gentlemen?

A. No.

Q. Mr. Patterson? A. No, sir.

Q. "——and at that time told me got hurt by falling or getting knocked off the car——." Did he tell you that? A. What?

Q. When he came to see you that day, January 3rd, did he tell you about being knocked off a car?

(Testimony of L. E. Mahan.)

A. Yes.

Q. Talk to you about it? A. Yes.

Q. Get any more details at that time?

A. No, sir.

Q. "——when we came against it to knock it in the clear. We came against this car pretty hard, hard enough to knock a man off if he did not have a good hold but I had not told Seamas to get on this car to release a brake——." Is that all true?

A. Yes.

Q. "——and did not expect him to——," is that true or false? A. True.

Q. "——as I was going to put it in the clear on the kick I was making." Is that correct?

A. Yes. [333]

Q. "Seamas had no business on the opposite side from where the signals and work were being given and handled." Is that true? Is that correct or incorrect?

A. Didn't have no business getting on those cars over there.

Q. Why is that so?

A. Because I wouldn't know, unless he notified me, he was going to go there. If I see him, I would have to look out.

Q. "I do not know what he was doing out of place, which he is most of the time——" I am not going to ask you anything about that, sir "——and I had no idea he was on this car when we went against it, and if he was on it, I only have his word for it being a fact, and I did not learn he was on

(Testimony of L. E. Mahan.)

it until January 2, 1951, when Seamas made the statement in my house in the presence of some person unknown to me." Is that correct or incorrect?

A. Part is and part isn't.

Q. Tell me which part is? A. All right.

Q. "I do not know what he was doing out of place——" Is that correct or not? A. Yes.

Q. "——which he is most of the time——" Not going to ask you about that. "——as I had no idea he was on this car when we went against it." Is that correct? A. That is right. [334]

Q. "——and if he was on it, I only have his word for it being a fact——," is that correct?

A. That is right.

Q. "——and I did not learn he was on it until January 2, 1951——" Is that right or wrong?

A. I learned about it the night it happened.

Q. "——when Seamas made the statement in my house in the presence of some person unknown to me. The night was dark, foggy and damp." That is correct, is it? A. Yes.

Q. "The brake was on the west end of the car and we came against the east end of the car, kicking it west." Is that right? A. That is right.

Q. "Seamas had an electric lantern but there was no indication of a light on the brake platform of the car when we came against it." Correct or not?

A. I was unable to see the brake platform because it was on the west end of the car and I was on the east end of the car.

(Testimony of L. E. Mahan.)

Q. Did you see any light? A. No.

Q. Did you see any reflection of a light in the foggy weather? A. No.

Q. "——as far as I could see, and I was about a car length away when the move was made." Is that all true? [335]

A. Well, no, I was right there, close, but I won't say how far. Maybe ten or fifteen feet.

Q. All right, that is the entire statement. Now, Mr. Mahan, on December 16, 1950, you wrote a report in your own handwriting, didn't you?

A. Yes, sir.

Q. That is it, is it? (Handing document to the witness.) A. Yes, sir.

Q. Anybody assist you in making that report? Is that your report, sir? A. Yes.

Q. Is it in your own handwriting?

A. Yes.

Q. Did anyone help you make that report?

A. No, sir.

Q. Where did you make it out?

A. At the yard office.

Q. Anybody with you? A. No, sir.

Q. By yourself? A. By myself.

Mr. Cummins: I offer this report in evidence, your Honor.

Mr. Papas: Your Honor please, I cannot understand the purpose of this report. I think it is compounding the evidence already. If it is for the purpose of impeaching the [336] witness——

Mr. Cummins: I will be glad to state what the

(Testimony of L. E. Mahan.)

purpose is. In view of your Honor's remarks, the kind of remarks and the manner in which your Honor made the remark, in spite of the fact that your Honor has told the jury to have no intention of indicating how the Court felt, I think it is important, that this report is a very highly important document.

The Court: Counsel, for the purpose of clarification, and so I may understand your statement, what did you mean by the manner in which I made the statements?

Mr. Cummins: Your Honor cross-examined this witness, with all due respect to the Court, I felt your Honor cross-examined this witness rather harshly.

The Court: He is a bit hard of hearing, which is quite evident to the Court, any information or added emphasis I may have given was directed to that extent, and not for the purpose of cross-examining the man. I am trying to elicit truth. I may have a little emphatic way of speaking. I think I have. That is not concerned with my attitude toward an individual; and if by an over-emphasis, or if by an endeavor on my part to have my questions understood, I indicated that I was cross-examining this man, I want that to be entirely eliminated from the minds of the jurors.

Mr. Cummins: Thank you, your Honor.

The Court: I did not intend to cross-examine him in [337] that sense. I intended to elicit information. I do suppose I examined rather emphati-

(Testimony of L. E. Mahan.)

cally at times for the avowed purpose of being understood.

This court room from the acoustical consideration is improperly constructed. That is a matter of engineering, not of legalistics. During the course of the Bridges case, where I participated a few months, we could not hear the witnesses and I had to get this equipment and we have had it ever since. It is difficult to hear witnesses, and it is difficult to hear counsel at times. You may recall I asked you at the very threshold if you couldn't raise your voice.

Mr. Cummins: Yes, your Honor.

The Court: I did not intend to reflect upon this man. He admits he made the statement, admits there are certain corrections he wanted to make in the statement. He has made the corrections. That is the extent of it. The credibility is for the jurors. Whether they believe the man fell off the car, whether they believe the man was injured, that is your problem; and in interrogating this gentleman, I did so to the end that you would have a full, fair and complete exposition of the facts. The decision of a case is sometimes difficult. I sometimes feel that I am aided and assisted by a jury. Do I clarify myself, counsel?

Mr. Cummins: Yes, your Honor. I had only this purpose, to do my duty to my clients of saving an exception, which I would [338] like noted on the record.

(Testimony of L. E. Mahan.)

The Court: Yes.

Mr. Cummins: In view of what transpired, and I feel it is incumbent on me as attorney for the defendant to make as complete and full a disclosure of which I am capable, and in view of just convincing that the man was not correct, that he was informed by anyone, I ask that this statement in his own handwriting go in evidence.

The Court: May I see it?

Mr. Cummins: Yes, your Honor. (Handing document to the Court.)

Mr. Papas: There is no evidence in this case that he was informed by anyone, as counsel states.

The Court: In addition, I might add that not only is the hearing of a witness most difficult in this court room, but in addition you can't see. So I have an added thought. I had to have that equipment installed to the end that I not go around with a miner's light on the bench.

For the purpose indicated, Mr. Cummins, the statement may be received and marked in evidence on behalf of the defendant.

(Statement of L. A. Mahan, December 16, 1950, was received in evidence and marked Defendant's Exhibit No. D.)

The Court: Is the other statement in [339] evidence?

Mr. Cummins: I want to offer it, your Honor.

The Court: It may be marked appropriately as defendant's exhibit next in order.

(Testimony of L. E. Mahan.)

(Statement of L. A. Mahan, dated January 3, 1951, was received in evidence and marked Defendant's Exhibit E.)

Mr. Cummins: At this time, if I am capable of doing so, may I read the statement? I don't know whether I can make it out or not.

"Form 1428 Standard Report, Santa Fe."

Mr. Mahan, no reflection on your writing, and I am sure I write worse than anybody else in the court room, but what is that (handing document to the witness)? A. "Coast," looks like.

Mr. Cummins: "Name of injured person, J. J. Seamas. Residence, Stockton. Occupation, Switchman. If married, name and residence of husband or wife." That is filled in "Yes." Names and ages of children, "Don't know." If employee, how long in service of this company? "Since 1937." "Under whose direction was he working at the moment of accident? L. A. Mahan. If passenger, where from?" Then that is filled in with an "X." The next one, two, three, are marked with "X's." They aren't filled in.

Question No. 11: "State fully nature and extent of injuries. He showed me his leg that night"——

Q. What is this, Mr. Mahan? [340]

A. "He showed me his leg that night——" I can't read my own writing.

Q. That is "small"?

A. "Skinned place," I guess it is. Yes.

Mr. Cummins: "He showed me his leg that

(Testimony of L. E. Mahan.)

night, small skinned place, but he claims he got knocked off of car and now his back is hurt.

"12. What was done with or for him, and by whose direction? Nothing as did not think injury was enough to mention.

"13. Name and address of surgeon. None.

"14. Number of cars in train. 25.

"Number of cars airbraked. None.

"Date of accident. December 9th, about 9:00 p.m.

"Nearest station, Mormon. Mile post 11-22.

"If night, was headlight burning? Yes.

"Kind of weather, Fog, snow or ice. Clear.

"On main or side track? Side track.

"Curve or straight? Straight.

"Up or down grade? Level."

Q (By Mr. Cummins): Is that right? Can you tell us what that is, Mr. Mahan?

A. Yes, that is "Level."

Q. "Up or down grade, Level?"

A. Yes. [341]

Mr. Cummins: "Number of train, YL"——

A. Yard.

Mr. Cummins: "Engine 2351. Direction bound, Yards. Speed five miles per hour.

"Conductor, yardmaster or foreman, L. A. Mahan.

"Engineer, B. Marrs. Fireman, Strain.

"Brakeman, Switchman or other employees: J. J. Seamas and S. A. Weith.

"If foot caught in switch or frog, was switch or

(Testimony of L. E. Mahan.)

frog provided with safety blocks, and what kind? No."

Then there are some "X's."

"Extent of injured person's acquaintance with road at and in the vicinity of the place of accident. Yes.

"Was there any rough handling of cars or engine? No.

"Was injured party attending strictly to his duties? Yes. Were the surroundings such as to afford him a safe place to work? Yes.

"Was ground or floor clear of obstructions? Yes.

"Was view of trainman or injured person obstructed? Yes.

"If so, by what? He was on opposite side from me and did not know he was on car."

The next thing filled in was:

"Was bell ringing or whistle sounded before accident? No."

Pardon me, there is one up here: [342]

"Was there any defect in track, bridges, rolling stock, machinery, tools or other appliances, which caused this accident? If so, explain fully, giving initials and numbers of any defective cars, and so on. No.

"Did you witness accident? No."

Q. (By Mr. Cummins): What is the purpose, Mr. Mahan, of having some of these questions marked "X"?

A. Well, they wasn't involved in this accident.

(Testimony of L. E. Mahan.)

Q. "Was bell ringing or whistle sounded before accident? No.

"Did you witness accident? No.

"State your location with reference to point of accident, and tell what you were doing. Kicked this car to No. 9, and it had a brake on it and did not go to clear and had to couple in to it and give it another kick.

"Did injured person say anything to you, or anyone else, about accident after injury? If so, what? He said he got his leg skinned and that was all. Kept on working and I did not think the injury was anything to speak of.

"In whose hearing was it said? Helper Weith.

"Give names, occupation and post office address of all persons not already mentioned who witnessed the accident."

That is filled in, "None."

The next thing is: "Give full particulars. J. J. Seamas claimed he got hurt, but he was on off side and I did [343] not see accident.

"Sign here"—— And Mr. Mahan's signature, and "Occupation, Engine Foreman." Dated, December 16, 1950.

That is all the questions I have of this witness.

Recross-Examination

By Mr. Michael:

Q. Mr. Mahan, do you wish to make any corrections in this statement at this time?

(Testimony of L. E. Mahan.)

Mr. Cummins: Well, that is an indefinite question.

A. No.

Mr. Cummins: I think the witness is entitled to have a little bit more information.

The Court: Yes. You might ask him specifically.

Q. (By Mr. Michael): Mr. Mahan, you state in your statement that was just read that the track was straight, is that correct?

A. Describe what?

Q. The track was straight.

A. Yes, it was straight lead there, right where the car was going at No. 9.

Q. Is that straight or isn't that a curve that blends into the lead?

A. The car was located at No. 7 switch, which would be almost straight, and up until I got into No. 9.

Q. You state you had 25 cars on the train?

A. Well, there must be some mistake about that, somehow.

Q. There must be some mistake about [344] that? A. Yes.

Q. You state the weather was clear?

A. The weather was—I could see. They say it was foggy, but I don't recollect it being too foggy. I could see good.

Q. Was it foggy or was it clear, Mr. Mahan?

A. I couldn't—they tell me it was foggy, I have heard, but at that time I could see quite a ways.

(Testimony of L. E. Mahan.)

Q. You state that the speed of the train was five miles per hour. Is that correct?

A. Speed of the train five miles per hour? Well, I don't know. I just made a guess at that.

Q. That is a guess?

A. That is just—five miles per hour? I could have been going that fast, but I don't think so.

Q. Do you recall the time when this last statement was made? I don't believe it is dated, your Honor.

A. When the statement was made, sir?

Q. Excuse me, it is.

The Court: December 16th.

Q. (By Mr. Michael): December 16th, I am sorry. This statement was made December 16, 1950, isn't that correct? A. I guess it is.

Q. And this statement was made January 3, 1951? A. Yes, sir. [345]

Mr. Michael: No further questions, your Honor.

The Court: The witness is excused. Thank you.

(Witness excused.)

Mr. Cummins: I would like, your Honor, to call Mr. Wilson back to the stand to clarify something.

NEIL WILSON

recalled as a witness for the defendant, previously sworn.

The Clerk: You have heretofore been sworn and you are still under oath. Please take the stand.

(Testimony of Neil Wilson.)

Direct Examination

By Mr. Cummins:

Q. Mr. Wilson, to remind the jury, you are still a trainmaster for the Santa Fe Railway Company at Stockton? A. Yes.

Q. Are you a principal officer in Stockton representing the Santa Fe?

A. I am the principal officer in Stockton representing the Santa Fe between Fresno and Richmond, yes, sir.

Q. All right. Now, can you tell us whether or not there were, in December, 1950, any lights in the Mormon Yard?

A. Yes, sir, Mr. Cummins. We have had at the switch shanty where this alleged accident occurred, we have a switch shanty and it has a pole, and has a light about, oh, I would say 15 or 20 feet up, with a reflector on the back of the light so as to throw the light down the lead in the vicinity [346] of 10, 9, 8 and this 7.

Q. How long has it been there, Mr. Wilson?

A. Well, the definite date? I couldn't say, but I have been around Mormon and on this Division for 15 years and I know it has been there at least two or three years.

I might add that the pole—we have a pole for a flood light which is a considerable height, but the flood light has not been installed, but the light half way up the pole has been there for some time.

(Testimony of Neil Wilson.)

Q. All right, sir. Do you have any duties in connection with the rules of the company?

A. Yes, sir, I examine employees on the rules and interpret the rules as to their meaning to employees when they are employed as well as to the employees after they come up for promotion.

Q. Did you ever examine Mr. Seamas on the rules?

A. Well, I am satisfied that he was examined. I couldn't say definitely whether he worked at Bakersfield or Stockton, but one trainmaster on the Santa Fe Railroad examines all employees before they enter service, and further, we have a road examiner that comes over the road and re-examines the men on the book rules frequently to keep them before their eyes, yes, sir.

Q. I show you Rule 820 in the rule book, Mr. Wilson. Can you tell us whether or not in your instructions—can you tell us [347] whether or not in your experience on the railroad it has any application whatever to a switch move?

A. Mr. Cummins, Rule 820(a) says: "In switching cars the following must be observed: Warn persons in, on, or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading."

That refers to switching cars where cars are picked up in the yard at various points and broken out on the lead and segregated as to destinations, points they are intended for, eastward movement or westward movement.

(Testimony of Neil Wilson.)

And 820(a) says: "Warn persons in, on, or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading."

That refers to a switchman, if he is going to switch some cars into a house track——

Q. Just a minute. What is a house track?

A. A house track is where they unload merchandise cars. When a switchman comes up against that track, he must first determine whether there is any boards in the cars for men to be unloading the cars, or an automobile is picked up, which would foul the kick. In other words, he is to see and determine whether it is safe to shove his cars in before he makes the move, Mr. Cummins. That Rule 820(a) applies to switching cars, not train cars.

Q. Does that have any application to the sort of thing that [348] occurred December 9th, where you have a field man instructed to go over and line the switch and make a kick move down to the track?

A. Mr. Cummins, a switch move in the yard—which I have had 41 years experience in various yards, switch job, you handle the cars—it doesn't have any bearing to the particular move made in this case. This was made in accordance with all rules and safety of operations.

Q. Is there any other rule there that has application to the situation? That is, Rule 820, any subdivision that has application to the situation we are now concerned with?

A. 820(b) says: "Where engines may be working at both ends of a track, or tracks"——

(Testimony of Neil Wilson.)

Q. That wouldn't be it.

A. That wouldn't be it.

Q. 820(c)?

A. That says: "Cars containing livestock must not be kicked or dropped, when avoidable." That doesn't apply.

Q. I was thinking about 820(c) was the one mentioned. Let me see that. 820(c): "Cars must not be shoved without taking proper safeguards to avoid accidents. Slack must be stretched to test couplings."

A. That means that cars must not be shoved without first taking the proper safeguards to avoid accidents. Well, in all our yards, the big terminals, we have switch engines [349] working at both ends of the yards. One engine on the west end may be breaking up a cut of cars, segregating as to destinations. We have another engine working at the east end doing likewise.

Our instructions to all employees, not to shove the cut of cars up blind. We mean without some employee on the end of that signaling so that we don't shove through the track and sideswipe or cause a collision with the other engine. That rule refers to cars without first taking safeguard to avoid accident.

It says, "Slack must be stretched to test couplings." You should stretch it to see that all couplings are made, because if you start with a coupling wasn't made, the cars could roll clear to the yard and cause an accident.

(Testimony of Neil Wilson.)

Q. What is Rule 813?

A. Rule 813 states: "When obedience to signals on part of engine man is essential to the safety of an employee in the performance of his duty he must know that the signals have been seen, understood and obeyed, before placing himself in a dangerous position."

"When a movement for which signal has been given is incomplete, or not clearly understood, or the person giving the signal, or the light with which signal is given, disappears from view, engineman must stop immediately and sound signal 14(j)." Fourteen (j) means four toots of the whistle. [350]

Q. All right. What does that signal mean—what does that rule mean, rather, in reference to a move such as being made to push the cut or the car west from the tail track down No. 9 track, or kick it?

A. Well, if you are a member of a switch crew and walking down alongside the cars, and if the lights should disappear between the cars, the engineer must immediately stop because his signals—he don't know where that man is or what he is up to. That is a safety move we have for protection of an employee.

Q. If the engineer has one light in view is he permitted to move the train?

A. One light is his indication of the signal that he can accept, yes.

Q. I am going to ask you about yourself. On what side of the train at Stockton does the switch-

(Testimony of Neil Wilson.)

man and engineer usually and customarily work?

A. Mr. Cummins, we use diesel switch engines at Stockton, diesel electric. The fireman is on the diesel merely to give signals or catch signals or to observe the position of cars on the side of the track. But we have to give signal directions to the engineer. We work on the engineer's side because you throw a signal to the fireman he would have to relay the signal over to the engine man, which would cause delay, slow yard movement, and for that reason we always work on the [351] engineer's side, in switching cars, and that is standard all over the Santa Fe Railroad.

Q. Does that tie in in any way with Rule 813?

A. It isn't applicable, Mr. Cummins, as to Rule 813.

Q. Under what circumstances, if any, is it permissible for a switchman to board a train or cut of cars on the north side of the train, or the fireman's side of the train?

A. Well, at Stockton, Mr. Cummins, we have a location—you have the picture on the blackboard—face a slight grade from east to the west—which we call north or south, but it is east and west. Right up on the east lead we have more or less of a slight sag or level-off spot in the yard. The engine foreman in switching cars in that location will kick the cars into any of the tracks. After they clear the leader track, or where all the tracks join, the car will roll down out of the way so that he can let some more cars go in the same track.

(Testimony of Neil Wilson.)

Q. Apparently I didn't make my question clear to you, Mr. Wilson. Under what circumstances, if any, is it permissible for a switchman to board a cut of cars or a car on the north side of the track, or on the north side of the train or cut of cars?

A. Ordinarily the switchman would work on the engineer's side, but if he should be down in, say, No. 2 switch on the diagram, and cars would roll down No. 6, he could cross over [352] and set a hand brake on the car and bring it to a rest. But ordinarily the foreman would expect his helpers to be on the side which he is operating and then he knows what their position is at all times.

Q. Would it be permissible for him, under the rules or custom to get on a train that was being worked in the yard, or a cut of cars that were being moved, or about to be moved, if he knew that?

A. Wouldn't be a rule for safety, the man place himself in a position where he could get on without the knowledge of his foreman, who is responsible for the safety of his helpers.

Q. Would it be permissible if he got permission from the engine foreman?

A. If he did secure permission from the engine foreman, the engine foreman then would be in a position to know where he was located, and handle the work accordingly.

Mr. Cummins: Cross-examine.

The Court: We might take a recess, ladies and gentlemen. I had no opportunity to discuss this matter with counsel, but I have had a matter set

(Testimony of Neil Wilson.)

this afternoon of some importance, and under the circumstances we will adjourn this case until tomorrow morning at 10:00 o'clock, at which time further examination of this gentleman may be taken up by counsel for the plaintiff. I assume this completes the evidentiary aspect of the case? [353]

Mr. Cummins: Yes, your Honor, it does.

Mr. Papas: Yes, your Honor.

The Court: Counsel for both sides may argue the case, the Court will instruct you, and the matter will be submitted to you tomorrow, Friday, for decision. We will adjourn this case until tomorrow morning at 10:00 o'clock. Same admonition.

(Whereupon, an adjournment was taken to Friday, October 5, 1951, at the hour of 10:00 o'clock a.m.) [354]

October 5, 1951—10:00 A.M.

The Clerk: Seamas versus Sante Fe Railway Company, on trial.

Mr. Papas: Your Honor, may we at this time enter into a stipulation by and between respective counsel in connection with the life expectancy of the plaintiff in this matter?

The Court: Yes.

Mr. Papas: Your Honor, according to the Commissioner's 1941 standard ordinary mortality table, the average life expectancy of a person aged 37 is 31.75 per cent. Is it so stipulated, counsel?

Mr. Cummins: Yes, so stipulated.

The Court: So ordered.

NEIL WILSON

resumed the stand, previously sworn.

Cross-Examination
(Continued)

By Mr. Papas:

Q. Mr. Wilson, just a couple of questions, please.

A. Yes, sir.

Q. Would you be good enough to tell us do you live in Fresno or in Stockton?

A. Sir, I live in Stockton and my office is in Fresno, and I have jurisdiction on the railroad between Fresno and [355] Richmond.

Q. I see. Where is your office in Stockton?

A. My office is up over the Stockton depot where the passenger station is.

Q. That is at San Joaquin Street and Taylor, I believe? A. Correct.

Q. Do you have occasion to go out to the Mormon yard?

A. Sir, I have occasion to supervise the railroad between Fresno and Richmond, and I am in numerous places; not only Stockton, but Riverbank, Pittsburg, and Antioch. Wherever the Sante Fe service requires my supervision.

Q. By that you mean that you travel all over these different yards, is that correct?

A. Yes, sir, that is correct.

Q. Mr. Wilson, I take it that you are aware Mr. Mahan has been working for the Sante Fe Railroad for a number of years?

(Testimony of Neil Wilson.)

A. Yes, sir, he testified here yesterday, if I recall.

Q. We don't care what he testified to. We are asking you whether or not you know from your own knowledge, sir, whether he has been working for the Sante Fe Railroad for a number of years.

A. I know he has been at Stockton for a number of years, yes, sir.

Q. How long, if you know, has he been a foreman?

A. He has been an engine foreman ever since I came to the [356] Valley Division which is probably 15 years that I have been on this territory, and he was engine foreman at the time I arrived here.

Q. I see. And he has worked at the Mormon yard for quite some time, has he not?

A. Yes, sir, he has been an engine foreman and worked in Mormon yard, also Stockton yard, and also the Port of Stockton.

Q. And I take it, Mr. Wilson, that he has had occasion to use this track known as the back lead track and the lead track and the tail track for quite a period of time, hasn't he?

A. Yes, sir, he uses that very frequently. During his tour of duty he is required to switch cars to these particular locations, yes, sir.

Q. And I take it, Mr. Wilson, that you travel Fresno, Riverbank, Hanford, Stockton, Richmond, and as you say, wherever the Santa Fe in that area has a division?

(Testimony of Neil Wilson.)

A. With the exclusion of Hanford. I don't go any further east than Fresno.

Q. Can you tell us, sir, how is it that you remember there was a light near the shanty when Mr. Mahan, who has been working for the Sante Fe and Stockton as foreman for approximately 15 years and has used this track time and time again, doesn't even remember whether it was there on December 9th?

A. Sir, I looked up the records, and on August of 1949 the authority was granted for the installation of this light at [357] that location, sir.

Q. I see, but the authority was granted, but you didn't know from your own knowledge whether or not that light was there at that time, do you?

A. Sir, I testified here that I was not definite the exact date, and I am not, sir.

Q. And you don't know whether it was there on December 9th, 10th, or the 11th?

A. I wouldn't specify December 9. I said I was not sure when the light—but the authority from the Sante Fe Railroad to install the light was issued August, 1949.

Q. I see. Now, Mr. Wilson, are you acquainted with Mr. Archibald in Stockton?

A. Yes, sir, I am acquainted with Mr. Archibald and any other railroad man under my jurisdiction. I personally make it a point to be acquainted with them, sir.

Q. Sir, is it not true that Mr. Archibald is a rules examiner for the Sante Fe Railroad?

(Testimony of Neil Wilson.)

A. No, sir, I am the rules examiner on the Santa Fe Railroad between Fresno and Richmond. I examine all the employees from train service, yard service and engine service on the operating rules of our company.

Q. Now yesterday you stated, Mr. Wilson, that it is the practice of the various employees of the railroad to work on the side where the engineer's side is, is that correct? [358] A. Yes, sir.

Q. And now you stated that on this particular track or switch yard it is customary to work on the south side, is that correct?

A. Yes, sir, when the engine is pointed east they would have to work on the south side so they would be in position to pass signals to the engineer, that is right, sir.

Q. Well now, Mr. Wilson, we have track switches designated on this board, do we not.

A. Yes, sir.

Q. It is occasionally necessary for a switchman to go over there to manipulate those switches, is it not? A. Yes, sir, that is his duty.

Q. And if it is his duty he obviously has to go on that side of the track, doesn't he?

A. If he is lining up like in this particular case it has been testified he had five or six cars and in a switch yard none of these cars as a rule is destined to the same location. Therefore, we have different tracks designated in the yard for cars destined to the Western Pacific, destined to Southern Pacific, destined to Richmond, and it is the field man's

(Testimony of Neil Wilson.)

responsibility after he secures a tab from his engine foreman where these cars are to be separated, it is the field man's responsibility to go over on that side and line up the switches so the engine foreman can make the moves. [359]

Q. Mr. Wilson, may I ask you, sir, that you as an expert, and I take it that you were placed on the witness stand for the purpose of testifying as an expert?

A. I consider myself as an expert in switching and railroad operation or I wouldn't have the present position.

Q. You have been a yardmaster or a trainmaster for about 15 years, haven't you?

A. I couldn't give you the exact date. However, I have been an employee of the Santa Fe Railroad for 41 years, sir.

Q. You certainly must know, it is important to you, it is an important job, you certainly must know how long you have been a trainmaster.

A. I was promoted to a trainmaster in 1935, I believe, sir.

Q. Well, that is what I wanted to know. And I take it that you haven't done any switching of cars since you have become a trainmaster have you?

A. I beg to differ with you, sir. During the war I not only was a switchman, but a yardmaster. I was a brakeman and I was a fireman and I was a call boy and anything that required my services during the war I participated in.

Q. You know everything about railroads.

(Testimony of Neil Wilson.)

Mr. Cummins: Well now, that is argumentative.

The Court: Yes, that is.

Mr. Papas: I will withdraw that, your Honor.

Q. Well now, I was about to ask you, Mr. Wilson, if you were [360] line up track switch No. 9 and then the switch list indicated that you had to line up track switch No. 2 or 3, whatever it is, 4, 5 and 6, wouldn't it be logical and reasonable for you to walk from track No. 9 to track No. 3 and then walk back towards track No. 6 and the No. 10 switch?

A. Not in a switching move, sir. If the first car into this cut is destined for 9 track, the field man would drop off and line No. 9 track switch. Then if the next car was destined for No. 4 track he would walk down the lead and line No. 4 track switch, and when the engine foreman kicked the car into 9, it would be the engine foreman's duty to reverse the switch and be ready to make the next move down the lead where the cars are destined.

Q. Didn't you state a moment ago that it is the job of the employees to do as much as possible on the south side of this track?

A. Yes, sir, that is the rule. That is where he should be unless he has other duties which have been given him by his engine foreman which he should perform because he is a helper for his engine foreman to expedite the switching of cars, sir.

Q. Isn't it logical, then, for him to work from this position towards the No. 10 track switch so that eventually he can get over on the south side?

(Testimony of Neil Wilson.)

A. He wouldn't work towards the engine, he would work away from the engine, sir, if the cars was going down the lead. He [361] would be of no benefit to the engine foreman. He could line the switch.

Q. In other words, your statement then is that Mr. Seamas should have worked in this direction (indicating)?

A. Yes, sir, if he lined No. 9 switch and his tab which I am not familiar with where the next car was destined—I don't know what cars he had hold of or where they were going, but you stated that if it was No. 4 he should line No. 9, walk down the leads toward No. 4 and line that switch.

Q. That is what I am asking you, sir. In other words, he would walk from 9 over to 4 or 3, wouldn't he?

A. Yes, he would line up the switches down the lead where the cars are destined.

Q. Yes, he would line No. 3, he would go over to 4 and 5 and 6, wouldn't he?

A. He could come down the lead. You are going up the lead.

Q. Up or down, whatever you call it.

A. That is the proper method in switching box-cars, sir.

Q. Very well. Yesterday you testified that as far as you were concerned, all these moves and this particular move that involves us here was made according to all safety regulations and practices, is that correct?

(Testimony of Neil Wilson.)

A. Well, I wouldn't say, sir, because if you wish me to tell you I can tell you.

Q. Didn't you say yesterday that you felt it was your opinion [362] that it was made with all the safety that was possible?

A. Well, if an employee gets up on the blind side of a car without the knowledge of the engine foreman and for no reason whatever, I wouldn't consider it safety on his part.

Q. Excuse me, sir, that is not my question. I asked you whether or not you stated yesterday, whether it was your opinion yesterday that this particular move was made with all the safety that was required.

A. As far as the engine foreman is concerned, as far as the operation of the engine, that part, but the unsafe part about it was the man getting up on the blind side.

Q. You are not answering my question, sir.

A. Well, I have tried to, sir. You asked me if the move was safe and I told you that I don't consider it safe.

Q. I am asking you if yesterday when you testified for Mr. Cummins you stated that this particular move, as far as you were concerned, was made with all the safety regulations that were required?

A. Well, as far as the engine foreman's move and as far as the car to be kicked into No. 9 is concerned, that certainly is in accordance with all the rules of safety and everything; but as far as

(Testimony of Neil Wilson.)

me following through, I am not able to do that, and I am not going to.

Q. You don't know whether it was made with all the safety regulations or not, do you? [363]

A. Well, as far as the cars pulled off the rip track are concerned, as far as the engine foreman giving the instructions to his switchmen as to their positions and what to do, that part of it was absolutely safe as the Santa Fe knows how to make it, sir.

Q. Well, you don't know if it was safe on this particular occasion, do you? You weren't there.

A. No, you asked me if I thought it was safe. I am not testifying that I was there. I am just stating merely that as far as I know the rule the movement was safe.

Q. In other words, you have been sitting in this court room for four or five days and after hearing the evidence it is your opinion that it was made with all the safety regulations, is that right?

A. Up to a certain point, sir, but I don't say that all the movement was safe.

Q. Very well. Now, in connection with this rule 820A in which you state—which reads as follows:

> "In switching cars the following must be observed. A. Warn persons in, on or about cars before coupling to or moving them to avoid personal injury or damage to equipment or lading."

You stated that that applies only to house tracks?

(Testimony of Neil Wilson.)

A. Well, sir, it does not apply to that switching move because we would never get any cars switched or we would never [364] move any trains if we walked down, and that applies to a switchman when he is going into a warehouse track or any track where he is in doubt as to whether automobiles or trucks or bridges across the cars are involved, he must not shove that track until he warns persons, warns vehicles to avoid injury to person or property damage. But that doesn't apply to switching, sir, in any way.

Q. Does it apply to the yard service?

A. It applies to yard engines, but not yard service. It applies just what I stated, at those particular locations.

Q. What is the heading on this bold type, Mr. Wilson? What does that say?

A. That says, "Train and yard service."

Q. And then section 820 says:

"In switching cars the following must be observed." It doesn't say that it applies to the house track alone or to areas where cars are going to be taken for the purposes of loading or unloading, does it?

A. Well, in switching service, that interpreted by me and instructed to all switchmen, a switchman doesn't misinterpret that meaning of that rule. He knows where it applies. It applies to where I stated, sir.

Q. In other words, this is your opinion to the interpretation of this rule?

(Testimony of Neil Wilson.)

A. That is the interpretation of the rule all employees have [365] in yard service who have been examined by me by the book of rules, sir.

Mr. Papas: No further questions.

Mr. Cummins: Nothing further.

Your Honor, I have only one thing further, and I have been informed that I misread one item on this 1428 report. I would like to call the jury's attention to the item No. 14. I am told that there is a number scratched out there and it should read 5 instead of 25 cars.

Mr. Papas: May we see that a moment?

Mr. Cummins: Yes, you sure may.

Mr. Papas: Your Honor, we are going to definitely object to that. The document speaks for itself and if his Honor may look at it, there is nothing to indicate that it was scratched out. It says 25 cars here. There is nothing to indicate there was any scratching out. He admitted yesterday that he had it on here, it was his handwriting. We submit it to his Honor for inspection. There was no omission at all.

Mr. Cummins: No one has testified here about 25 cars.

The Court: "Number of cars in train 25." That appears in the face of the report.

Mr. Cummins: Your Honor, "2" was stricken out. That is what I have been informed.

Mr. Papas: Well, I mean, your Honor, that is what counsel has been informed but the record speaks for itself. [366]

Mr. Cummins: Let the document speak for itself.

The Court: What may be interpreted according to the document in the light of any testimony in the record. Is that the case now?

Mr. Cummins: Yes, your Honor.

The Court: The matter is submitted on the evidence?

Mr. Papas: Yes, your Honor.

The Court: You may now argue the [366A] matter.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Monday, October 8, 1951

The Clerk: Seamas versus Santa Fe Railway Company, on trial.

The Court: Ladies and gentlemen of the jury, it is now the duty of the Court to instruct you as to the law of this case. When you were impanelled a week ago as jurors, I then advised you that you were the sole arbiters of the facts; that is, it is your exclusive province to find the facts in this case and to pass upon the credibility of all witnesses, and it is the Court's duty to instruct you as to the law. That is my exclusive province, and you must accept the Court's statements as to legal principles.

So that you may understand the processes, counsel for the plaintiff proposes instructions as to the law from his viewpoint; counsel for the defendant

then presents instructions from his viewpoint, and the Court attempts to refine their reasoning into principles and state the law as the Court believes it to exist.

This type of case does not present any very unusual principles of law because the basic statutes are found in the United States Code, and I will advert to them during the course of my instructions. And as I further will advert, this type of case is distinguished from the so-called workmen's compensation case, for in this type of controversy the plaintiff must [367] establish negligence on the part of defendant company before he can recover, notwithstanding you may have views to the contrary.

The recess period over the week end probably gave you an interval of time to look upon the facts objectively. Sometimes a respite can help not only a jury but also a court, and I feel that in the light of the legal principles which I have announced to you, a refinement of the facts should not be, perhaps, as difficult as the problem might have been had you gone into your deliberations late Friday afternoon.

With respect to the admissions in the case, it is admitted by the defendant in this case that the defendant was a carrier, being a railroad engaged in interstate commerce, and that the plaintiff was employed by the defendant in interstate commerce, and that the injuries, if any, sustained by the plaintiff, arose in the course of his employment while engaged in such commerce. Now, that admission between counsel created by the pleadings may be accepted by you as final. In short, the plaintiff was

injured while actually engaged in the course of his employment.

There is one other preliminary matter, and that is the filing of a complaint. As you know, or at least should know by this time, the complaint is not evidence in the case. The complaint is merely the framework, as in constructing a building, the superstructure of a case, then the evidence is [368] placed like bricks upon the superstructure. But the pleading is not evidence. It is merely a charge that must be substantiated by competent legal evidence.

In this case there was an amended complaint filed, based upon an affidavit which counsel referred to during the course of his argument, I think, counsel for the Santa Fe. And the fact that the complaint was amended and that an additional request was made for some $75,000 should not control you in any manner in arriving at your verdict, if you do arrive at a verdict. The plaintiff may ask for any amount he feels justified. But the question of providing damages, as in the proof of negligence, rests upon the plaintiff, and he must establish to your satisfaction—that is, he must discharge the burden of proof as to the damage aspect.

Now, the plaintiff at the time and place of the accident having been engaged in the conduct of interstate commerce, the statutes of the State of California governing employers' liability and workmen's compensation are not applicable to this case, and plaintiff's right to recover, if any, is based on statutes of the United States Government covering the liability of carriers, railroads, to their employees

for injury sustained while in the course of their employment. Statements of counsel in their arguments are not evidence in the case, unless statements are made as admissions or stipulations concerning the existence of a fact or facts [369] during the trial of the case. I indicated to you the admissions by stipulation with respect to the employment aspects.

I further charge you that in arriving at a verdict you are not to consider as evidence anything that has been stricken by the Court, or anything offered to be propounded or contained in any question to which an objection has been sustained by the Court.

If I made any statement during the course of this trial which seemed to you to reflect upon counsel or any of the witnesses, or seemed to you to indicate that the Court had any opinion upon the merits of the case or upon some fact or issue involved therein, then I direct you to disregard any such statement in reaching a verdict in this case.

In your consideration and determination of this controversy, you must treat it as a litigation between persons of equal standing in the community. Your determination should not be affected in any way by reason of the fact that the defendant is a corporation, nor should you be in any way influenced one way or the other by any thoughts or ideas you may have as to the financial standing of any party to this litigation. This case is to be considered and determined by you just as you would consider and determine any litigation between two private individuals.

The defendant corporation can act only through its servants, agents and employees; and so far as this case is [370] concerned, if there is no negligence on the part of any servant, agent or employee of the defendant it will be your duty to render a verdict in favor of the railroad company.

It has been established, or at least evidence was introduced, that at the time of the accident in question Mr. Marrs, Mr. Strain, Mr. Weith, and Mr. Mahan were the employees of the defendant, Atchison, Topeka and Santa Fe Railroad Company, and were, at the time of the events out of which the accident occurred, within the scope of their authority; hence, the alleged acts and omissions of these employees were, in contemplation of law, the acts and omissions, respectively, of their employer, the defendant, Atchison, Topeka and Santa Fe Railroad Company.

Thus, if Mr. Marrs, Mr. Strain, Mr. Weith or Mr. Mahan were negligent, their negligence, if any, is imputed to the defendant Santa Fe Railroad Company.

When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume, in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury.

In this case, a civil case, the affirmative of the issues must be proved, and the affirmative here is upon the plaintiff as to the affirmative allegations of the complaint. Upon the plaintiff, therefore, rests the burden of proof of such allegations. [371]

A portion of the Federal Employers' Liability Act in effect at the time of this accident reads as follows:

> "Every common carrier by railroad shall be liable in damages to any person suffering injuries while he is employed by such carrier for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, or other equipment."

I further charge you that the railroad company does not insure or guarantee its employees against the possibility of accident. Its duty is to exercise ordinary care. Insofar as it performs that duty, it fulfills the law and incurs no liability for accidental injury. Inherent in the nature of a railroad business are certain hazards, but even such dangers do not make the company an insurer or change the rule of liability that I have stated, although, in the exercise of ordinary care, the amount of caution required increases as does the danger that is known or that reasonably should be apprehended in the situation.

You are the sole judges of the weight of the evidence and the sufficiency thereof, and the credibility of all witnesses. In determining the credibility of a witness, you [372] should consider whether his testimony is in itself contradictory, whether the statements made by such witness are reasonable or unreasonable, whether they are consistent with his

other statements or with facts established by other evidence, or admitted facts.

You may also consider the witness' manner of testifying on examination, the character of his testimony, the bias or prejudice, if any, manifested by the witness, his interest or absence of interest in the suit, his recollection, whether good or bad, clear or indistinct, concerning the facts testified to, his information or motives, together with the opportunity of the witness knowing the facts whereof he may speak. And having thus considered all of the matters, you must fix the weight and value of the testimony of each and every witness, and of the evidence as a whole.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed, and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that [373] be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

You are not bound to decide in accordance with the testimony of any number of witnesses against a less number, or against a presumption or other

evidence satisfying your minds. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

In civil cases a preponderance of evidence is all that is required, and the burden rests upon the plaintiff to prove his case by a preponderance of the evidence before he is entitled to a verdict. By a preponderance of evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force.

Preponderance of evidence means not the greater number of witnesses, but the greater weight, quality and convincing effect of the evidence, and proof offered by the party holding the affirmative as compared with the opposing evidence.

In an action of this character both direct and circumstantial evidence are admissible, and any fact in this case may be proved by either direct or circumstantial evidence or by both. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. Circumstantial evidence or indirect evidence is that which, though true, does not of itself conclusively establish that fact, but which affords [374] an inference or presumption of its existence.

A presumption is declared to be a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the

jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

I instruct you that a witness is presumed to speak the truth. This presumption may be repelled, however, by the manner in which he testifies, by the character of his testimony, by his motives, or by contradictory evidence. Where the evidence is contradictory, your decision must be in accordance with the preponderance thereof. It is your duty, however, if possible, to reconcile such contradictions so as to make the evidence reveal the truth.

When the evidence in your judgment is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the [375] party upon whom rests the burden of proof.

If any witness examined before you has wilfully sworn falsely as to any material matter, you may disregard his entire testimony; that is, being convinced that a witness has stated what is untrue, not as the result of a mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of such witness' testimony with distrust and suspicion and reject it all, unless you shall be

convinced that the witness in other particulars has sworn to the truth.

Negligence is defined as the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do. In other words, it is the failure to use ordinary care in the management of one's person or property.

There is no legal presumption of negligence. Negligence is a fact which, like other facts alleged by the plaintiff, must first be proved.

Proximate cause has been defined and must be understood to be that which in the natural and continuous sequence, unbroken by effective intervening causes, produces the injury and without which the injury would not have occurred.

I have just instructed you as to what constitutes proximate cause of a happening of an accident. In this connection you are further instructed that under the federal employers' liability act the employee need not prove, in order [376] to recover, that the negligence of the defendant or its servants was the sole proximate cause of his injuries. Under the law the railroad is liable for injury to its employees, even if its negligence is only a contributing proximate cause. It is only where the railroad's negligent act is no part of the causation that the defendant is free from liability.

I charge you that in this case the defendant railroad company was required to use ordinary care, by which is meant the degree of care that would

be used by a person of ordinary prudence under the same or similar circumstances.

I further charge you that although custom is not a substitute for ordinary care, a failure to observe custom may be evidence of negligence; but the standard, which is due care, is not fixed by custom or altered by its presence or absence; what others do is some evidence of what should be done, and custom may assist in the determination of what constitutes ordinary care.

Reference has been made to contributory negligence, allegedly as on the part of the plaintiff. Contributory negligence in this case is such an act or admission on the part of the plaintiff amounting to want of ordinary care in the circumstances as, cooperating or concurring with a negligent act of the defendant, if any, was a proximate cause of any injury complained of.

I must remind you of the fact that the [377] effective contributory negligence in a plaintiff's claim is different in a case brought under the federal law herein involved from what it is in the usual action for damages based on alleged negligence and brought under the state law. In the latter type of action where the state laws are controlling, contributory negligence by a person usually is a bar to any recovery by him. But in an action such as we are now trying wherein the federal law controls, contributory negligence, if any existed, does not entirely bar recovery, but does require a proportional reduction of damages that otherwise would be recoverable.

Under the law governing this case the question of whether or not the plaintiff's negligence contributed to his injury is a question to be determined by you as members of the jury from the evidence now before you. If such negligence of plaintiff exists in conjunction with the negligence of the employer, then the damages to be allowed must be proportioned between the plaintiff and the defendant according to their respective fractions of the total negligence. If, however, you find that negligence exists only upon the part of the plaintiff and none on the part of the defendant, you cannot award any damages to the plaintiff.

In considering the issue of contributory negligence it is your duty to consider all of the evidence which has been introduced in this case. [378]

Ladies and gentlemen, if you find that the plaintiff is entitled to recover, you may then award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused by the wrong complained of.

In estimating the amount of such damage, you may consider the physical and mental pain suffered, if any; the extent, degree and character of suffering, mental or physical, if any; its duration and its severity, and the loss of time and the value thereof, and loss of earning capacity. You may also consider whether the injury was temporary in its nature or is permanent in its character, and from all these elements you will resolve what sum will

fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the nature of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury which he has sustained.

While the law says recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as physical pain. It includes the numerous forms which physical and mental suffering may take, which will vary in each case with the nervous temperament of the individual, his ability to stand shock, the nature of his injuries, whether permanent or temporary. [379] Mental worry, distress, grief, mortification, where they are shown to exist, are proper component elements of mental suffering of that type for which the law entitled the individual to monetary redress.

I have instructed you on the measure of damages. However, you are not to assume from the fact that you have been instructed on the measure of damages, and the Court by so instructing you does not intend to convey the idea to you, or to tell you, that you should award damages to the plaintiff. You have been instructed on the measure of damages not because the Court feels one way or the other in this case as to whether or not the plaintiff should recover, but because the Court, in cases such as this, instructs on all of the issues of the controversy.

The mortality table was referred to during the course of the trial, and it was indicated that the expectancy of life of one aged 37 years is 31.75 years. This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find that plaintiff is entitled to a verdict. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited record of experience. [380] Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

In attempting to ascertain the amount of damages you find plaintiff may be entitled to by reason of loss of earnings, you may consider the mortality table which has been referred to and the length of his expectancy. However, you must utilize such table or tables as a general guide only. There are numerous other facts that you must keep in mind. Some of these are the general state of plaintiff's health at the time of the accident, the nature of his occupation, and the hazards attached to such occupation; reasonable expectations as to increase

or decrease of earnings with the passage of years. You should further consider the extent of plaintiff's disability, and the likelihood of plaintiff being able to obtain employment which will permit him to earn a part or all of his former salary. In fixing your award, if any, you are to agree upon such sum as will be the substantial equivalent of the lost earnings.

If you find in favor of the plaintiff, then I instruct you that in fixing the damages you can make allowance only [381] for such elements as have been proved with reasonable certainty.

You can allow nothing for elements of damage which are speculative or conjectural. As to future detriment, you can allow only for that which the evidence shows with reasonable certainty is likely to follow. If as to any claimed element of damages or detriment there is such uncertainty that you cannot determine that such element exists or that the claimed detriment is reasonably certain to result in the future, then to the extent of such uncertainty the plaintiff has failed to sustain the burden of proof, and such uncertainty must be resolved against him and in favor of the defendant, and any claimed element of damage past, present or future as to which such uncertainty exists must be eliminated from your considerations, and must be eliminated as an element to be compensated for.

If you should decide to return a verdict for plaintiff, and if you should find that as a result of the accident in question he has suffered a loss

of earning capacity that will affect his future earnings, you will be guided by these rules:

1. If loss of earning capacity is not total, you must make due allowance for anything the plaintiff is reasonably earning in the future either in his former line of work or in any other.

2. Even if you should find the loss of earning capacity [382] to be permanent, it would be improper to use the full life expectancy of the plaintiff as a basis for calculations, if his expectancy as a wage or salary earner is shorter. If the earnings expectancy is the shorter, that is the expectancy to use.

3. If the impairment of earning capacity is not permanent, then the computation must be based on only that period for which the temporary lack of capacity is reasonably certain to continue.

4. After finding in dollars and cents what the future effect on plaintiff's earnings is reasonably certain to be, you then must find the present value of such sum, and award only that present value for that particular element of damage. In doing this you will calculate on the basis that any sum you might award will be handled and invested with reasonable wisdom and frugality, and that all of it, except as currently and reasonably needed, will be kept so invested as to yield the highest rate of interst consistent with current interest rates and reasonable security. The present value will be a sum which, when supplemented by such income from it, will equal the total of such future loss.

I have about completed the instructions, ladies and gentlemen; and in concluding, I desire to admonish you that it is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict, if you can do so [383] without violence to your individual judgment.

To each of you I say that you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors; and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote for either party, nor be influenced in so voting, for the single reason that a majority of the jurors are in favor of such party. In other words, you should not surrender your honest conviction concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries in fixing such amounts. That plan or scheme is where each juror writes the amount to which he or she considers the plaintiff is entitled and the amounts so written are added together. This is a scheme of chance, and no element of chance may enter into your verdict, or enter into the determination of any question in respect thereto.

The clerk of court has prepared several forms of verdict for your convenience, and solely for your

convenience. One form of verdict has the title of the court and cause: Seamas versus Atchison, Topeka and Santa Fe Railway Company, [384] No. 30360. We, the jury find in favor of the plaintiff and assess damages against the defendant in the sum of blank dollars. Line for the signature of the foreman.

The other form of verdict, same title of court and cause. Verdict: We, the jury, find in favor of the defendant. Line for signature of foreman.

Upon your retiring to the jury room you will select one of your number as a foreman or forelady who will preside over your deliberations, and who will sign the verdict to which you may agree. It is necessary in these courts that twelve jurors agree upon a verdict. As soon as twelve of your number have agreed upon a verdict, you should have it signed by your foreman or forelady and then return with it to this courtroom.

Are there any exceptions or objections or omissions, counsel? If you have, they must be made in the absence of the jury.

Mr. Cummins: Yes, your Honor.

The Court: Will they be very lengthy?

Mr. Cummins: No, very brief.

The Court: You may make them in chambers, then. I shall ask the jurors to remain here briefly.

Ladies and gentlemen, under the law counsel on both sides are entitled to present at this juncture any exceptions they may have to my charge to you to the end that in the event the matter is reviewed

hereafter by any court an exception may be [385] made in the record.

We will take this opportunity of conferring with counsel in chambers, and the jury is admonished not to leave the courtroom, and not to discuss this matter until I finally charge you.

(The following proceedings were had in court chambers outside the presence of the jury:)

The Court: You might make your exception, counsel.

Mr. Cummins: Yes, sir. They are two in number. One is right at the beginning, your Honor, you were talking about the pleadings and admissions in the pleadings, and in them you told the jury that there are admissions in the pleadings that plaintiff was injured while engaged in interstate commerce. I don't believe that the answer admits an injury took place, or even that an accident took place. It is probably just one of those pro forma things.

The Court: Wasn't it admitted by stipulation in open court, counsel?

Mr. Cummins: That the accident, if any did occur, was in interstate commerce. In other words, the interstate commerce character of the commerce was admitted, but the fact that an injury——

The Court: I will correct that if you wish. I will say to the jury that the Court should submit a correction to the extent that it is admitted that the plaintiff was engaged at [386] the time in question in interstate commerce and in the course of his employment; however, it is denied that an in-

jury took place. I think that is a fair correction.

Mr. Cummins: Plaintiff's instruction No. 23 reads:

> "When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury."

I believe that instruction is erroneous for the reason that what it does is to tell the jury that the employer, under the federal act, insures the safety of the employee; and for the further reason that the law is that an employee could abide by the general rule of conduct on the part of the defendant, that is, he may anticipate the defendant will exercise ordinary care toward him, and that provisal and condition is not included in the instruction.

The Court: All right, your exception is noted. Do you have any, counsel?

Mr. Papas: No, your Honor.

Mr. Baraty: Judge, I note when you gave them the portion of the Employers' Liability Act, you mentioned the clause that reads "Defective Equipment," and that isn't an issue in this case.

The Court: Well, I think the jury has been fully [387] instructed on the question of negligence, and we withdrew the instruction as to safe place to work. I will make the one correction.

> (The following proceedings were had in the courtroom in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, there is one correction on the part of the Court. Mr. Cummins has directed my attention to a possible oversight, that although the defendant railway company admits that the plaintiff, Mr. Seamas, was engaged in the course of his employment at the time and place in question; and although the defendant railway company admits that he was engaged in interstate commerce, the defendant denies in the pleadings as well as during the course of the trial that the plaintiff was injured in the manner alleged.

With that correction, you may retire to the jury room for your deliberations, and the Clerk will send you the file and all exhibits after counsel on both sides have had an opportunity to examine the exhibits to the end that we not have any extraneous matter or foreign matter in the file folder. You may take with you all exhibits, and the Marshal will take you to a safe and convenient place for your deliberations. You may now retire.

(Thereupon at 9:45 a.m. the jury retired from the courtroom.) [388]

(At 10:35 a.m. the following proceedings were had:)

The Court: I have a request from the jury for the testimony of Mr. Mahan. I think we had better read the testimony in court. Where is counsel for the other side?

The jury has requested the testimony of Mr. Mahan. I believe both the jury and Court and

counsel will be better served if we read that testimony in open court rather than send the transcript to the jury. Is there a transcript available of Mr. Mahan's testimony?

Mr. Cummins: We do not have it with us, your Honor.

The Court: Do you have that, Mr. Reporter?

The Reporter: We have a copy of it in the office, your Honor.

The Court: I will ask you to get it and I will be available.

(At 11:10 a.m. the Court, counsel and the jury returned to the courtroom and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, you have asked for a review of the testimony of Mr. Mahan, and accordingly the Court has obtained through the medium of the reporter a transcript, and it may be read to you by question and answer.

Specifically, you direct attention to a portion of Mahan's testimony in regard to Mr. Seamas' authority to go on the car to check the brakes. Counsel have endeavored to narrow [389] the transcript to the particular issue, but I think it is rather difficult to do so and we may have to take and run through the full testimony, direct and cross-examination.

Mr. Reporter, will you read the same, please?

(Thereupon a portion of the testimony of Mr. Mahan was read to the jury by the court reporter.)

The Foreman: Your Honor, I think that covers the point we had in mind. Is that a correct statement, ladies and gentlemen:

The Jury: Yes.

The Court: All right, the jurors may retire for further deliberations.

(Thereupon, at 11:50 a.m., the jury retired from the courtroom.)

(The jury returned to the courtroom at 4:14 p.m., and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, your foreman has indicated that he would like to make a report to the Court looking toward your deliberations and the possibility of additional deliberations on your part.

The jury now has been in session for the greater part of the day, including the interval of the luncheon, during which you had a respite, and the matter being a civil case, you have given considerable time and energy toward a solution.

Mr. Foreman, may I ask you several questions—and I [390] do so with the consent of counsel. I have had a conference with them in chambers. May I ask you how you stand numerically, without indicating in whose favor?

The Foreman: Ten to two, your Honor.

The Court: Do you feel, Mr. Foreman, in the light of the problem involved, the specific problem that may be involved, and in the light of the deliberations you have just said you had, that additional

time might solve the problem and put an end to your deliberations?

The Foreman: Your Honor, we have approximately the same number as shortly after our conference, we will say.

The Court: Have you stuck at that figure approximately throughout?

The Foreman: Yes, we have. We have had five votes in all, with numerous discussions back and forth with all members participating and everyone giving their viewpoints. It has not changed the actual outcome of the vote at any time, and it has been from that time on, approximately ten o'clock until now.

The Court: I need not repeat to you, ladies and gentlemen, that these cases are expensive in the trial. Expense, of course, is not a matter in the administration of justice and should not be considered in arriving at a verdict or a decision. But at the same time the realities of a situation must be considered.

The cost in these cases is one that is assumed by the [391] United States Government. You people pay the price. You people pay for the operations of this court. You pay my salary. You pay the attaches' salaries. These courts are operated for the people, and traditionally we have sought to maintain a very high standard in the administration of justice.

A deadlocked jury, if this be a deadlocked jury, would result inevitably in a new trial. The case will have to proceed again, and a new jury impanelled,

the process gone through again, witnesses produced.

When I say that the cost ultimately falls to the government, I mean by that the cost of jurors, fees, witness fees, and so on, and the jury's fees. However, there is additional cost. The railroad company is required to maintain counsel, and equally the plaintiff has entailed cost, witness fees, doctors and the like.

So all in all, if there is a possibility of arriving at a verdict—and I don't mean a forced verdict where a person's sincere judgment must be forsaken, but I mean if there is a possibility of arriving at a true and just verdict in the case, it is my recommendation to you to return for further deliberations.

However, it is not my province to coerce you in any manner, because I do not believe that a coerced verdict is a verdict at all in either a civil case or a criminal case. I [392] mean by that one where a court keeps a jury out interminably until finally, by sheer exhaustion, one or two jurors will capitulate. I do not subscribe to that, and I can't countenance it as being a part of our judicial system.

But I do feel, however, if further deliberations might aid and assist you in any way whatsoever in an approach to your problem, that you should avail yourself of that opportunity. If, however, you feel that it would be a purposeless mission and task on your part, I believe that your foreman might now advise me. If the jurors desire to return for brief deliberations in the light of my remarks, you may do so. Mr. Foreman, what is your pleasure?

The Foreman: Your Honor, I think if we could

adjourn for some more deliberations I think it would be wise to try again, although we haven't had much success in the last six hours.

The Court: In the light of my remarks you might sit down and have a further discussion. I do admonish you, however, it is not my purpose to in any wise coerce any juror or jurors. It is not my purpose to in any way, emotionally or otherwise, sway your honest judgment if it be an honest judgment on the facts. However, if it be a stubborn viewpoint borne only from a whim or caprice or reason not found in the evidence, then I think in the interests of justice and fair play and common decency that a position of that kind should [393] be forsaken.

It is difficult, if not impossible, for either a juror or court to pry into a person's mind; and at the very heart of our jury system lies independent judgment and independent thinking, and I for one feel that so long as we can preserve that independent thinking and thought, just so long shall our system of jurisprudence survive.

I have sat in these courts now for six years, having come from the state court, and I look upon my experience with juries as one of the great experiences of my life. I have found juries here dispensing justice in extremely difficult cases. I have found them reaching verdicts that I knew were hard to reach, that would have been hard for me to reach, and I can say only the greatest praise for the cross section of the people as I find them here. You peo-

ple come in here from all walks of life, all creeds, all colors and all denominations. And it is your duty, equally with the Court and equally with counsel and the agencies of the court throughout, to maintain our jury system intact and decent and honorable.

So with those thoughts you might return, and without my reiterating, I do not intend in any wise to attempt to persuade or coerce, but merely to indicate your solemn responsibility.

You may retire for further deliberations.

(Thereupon, at 4:20 p.m., the jury retired from the court [394] room.)

(At 6:10 p.m. the jury returned to the court room and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Yes, your Honor, we have reached a verdict.

The Court: Mr. Marshal, will you accept the verdict, please? Mr. Clerk, will you read the verdict?

The Clerk: Ladies and gentlemen of the jury, hearken to your verdict as it shall stand recorded:

"We the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of $22,500.

"Signed Jerome A. Starr, Foreman."

So say you all?

The Court: Poll the jury, please.

(The jury was polled by the clerk.)

The Clerk: Your Honor please, the verdict stands unanimous.

The Court: The verdict may be noted and judgment entered thereon, and appropriate stay granted.

Mr. Cummins: May I have thirty days, your Honor?

The Court: Thirty days.

Ladies and gentlemen of the jury, I realize that this has [395] not been an easy case for you, and I quite realize the perplexities that probably confronted you in the case, involving as it did medical testimony as well as narrative testimony of witnesses. I desire to thank you for your zeal and devotion to your duty, and you are discharged now until further notice.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed Jan. 29, 1952. [395-A]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the appellant herein:

Complaint for personal injuries.

Answer.

Demand for jury trial.

Notice of motion and motion to amend complaint.

Order granting motion for leave to amend complaint.

Amended complaint.

Answer to amended complaint.

"Rule 820."

Verdict.

Judgment on verdict.

Motion for new trial.

Order denying motion for new trial.

Order granting stay of execution.

Notice of appeal.

Supersedeas bond.

Notice of filing bond on appeal.

Praecipe for transcript of record.

Designation of contents of record on appeal.

Deposition of Dr. C. A. Luckey.

Deposition of Joseph J. Seamas.

6 volumes of Reporter's transcript.

Plaintiff's Exhibits 1 to 7 (3 for identification, omitted).

Defendant's Exhibits A to E.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 29th day of January, 1952.

C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13246. United States Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellant, vs. Joseph J. Seamas, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 29, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13246

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

STATEMENT OF POINTS

Statement of points on which appellant intends to rely:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Erroneous instruction of the jury.

3. Error in law occurring at the trial and excepted to by appellant.

4. Irregularity in the proceedings of the court and abuse of discretion by which appellant was prevented from having a fair trial.

5. Insufficiency of evidence to justify the verdict and the amount of damages awarded.

Dated February 13, 1952.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY & HASSARD,

By /s/ J. H. CUMMINS,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 14, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED

1. All of the evidence introduced at the time of trial and transcribed by the Court Reporter.

2. All written exhibits.

3. All stipulations of the parties.

4. All orders, rulings and judgments of the court.

5. All pleadings.

6. All instructions requested and all instructions given by the court.

Dated February 13, 1952.

ROBERT W. WALKER,

J. H. CUMMINS,

PEART, BARATY & HASSARD,

By /s/ J. H. CUMMINS,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 19, 1952.

No. 13246

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 13246

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLANT'S OPENING BRIEF.

I.
BASIS OF JURISDICTION.

The above entitled case was brought pursuant to the Federal Employers Liability Act (45 U. S. C., Sec. 51 *et seq.*). The United States Court of Appeals has jurisdiction of the appeal from the judgment rendered in favor of the plaintiff and against the defendant pursuant to the Judicial Code, Title 28 U. S. C., Sections 1291-4. The complaint, at page 4 of the transcript of record shows that the action was brought under the provisions of the Federal Employers Liability Act.

II.
SUMMARY OF FACTS.

Appellee was a 37 year old switchman, employed by defendant, who claimed injury at Stockton, California, December 9, 1950. He and other members of a switching crew were switching cars during hours of darkness. Plaintiff claimed he heard a brake on a car sticking and told his foreman that he was going to climb on the car to release the brake and that the foreman said to go ahead. The engine foreman and another switchman were passing signals on the south side, or engineer's side of the train. Plaintiff climbed on to the car on the north side at which time the foreman permitted the cars attached to the engine to couple into the car on which plaintiff was climbing, knocking plaintiff off the car. It is customary to work on the south side, or the engineer's side of the train unless permission of the foreman to climb on the cars on the north side is given. The foreman disclaimed any knowledge that plaintiff intended to climb on the car at all. A brief abstract of facts with references to the record follows:

III.
ABSTRACT OF RECORD.

Plaintiff, a 37 year old switchman in the employ of the defendant Santa Fe Railway [R. 29] at Stockton, California, claimed he was injured December 9, 1950 [R. 32] while working as part of a switch crew under direction of the foreman, Mr. L. A. Mahan. Other members of the crew were Engineer Marrs, Fireman Strain, Switchman (pin-puller) Weith and the plaintiff, who was working as a switchman [R. 34-35].

According to plaintiff the injury occurred about 10:00 P. M. on a dark foggy night [R. 37] after the crew returned from supper [R. 40], the crew coupled the engine onto five cars and proceeded with them to No. 9 switch stand where plaintiff stepped off the cars and lined the No. 9 switch [R. 42]; then he walked to track No. 3 to a point marked S-1 on Exhibit 3, following a path labeled S-2 on Exhibit 3, then he lined a switch at No. 3 track and walked to track No. 5 labeled S-3 on Exhibit 3 [R. 43, 88].

Summarizing his testimony, the train was situated on a track running generally east and west. Plaintiff was east of the cars and engine. One car was kicked by the engine toward No. 9 track; however, it did not roll far enough and when the foreman kicked another car which was supposed to go into No. 6 track, it coupled into the car which had been kicked toward No. 9 track. Plaintiff then proceeded to the north side of the second car, the car on the east of the two cars that were coupled together, and told the foreman who was on the south side of the car, " 'I am going to go up and check that brake or see whether the brake was set' and he says 'Okay, Kid, go ahead' " [R. 42-48]. Foreman Mahan was ten to twelve feet away on the south side of the cars and two cars were separated from the engine and three other cars by a distance of about 150 feet [R. 90-91]. Plaintiff then climbed up the ladder on the northwest end of the western-most of the two cars. He testified that, "As I get up to the brake platform with my right foot, I was knocked off."

Plaintiff was carrying a lantern and had climbed up the ladder on the north side of the western-most car to a position ten to twelve feet above the ground. He fell in rough dirt and was able to get up right away, although

in pain, feeling a burning sensation from his knees to the small of his back. According to plaintiff, the foreman asked him if he was hurt and he replied that his legs and back were sore [R. 54-55]. He remained on the job from thirty to forty minutes, drove his automobile home and about 12:00 A. M. that night, called a doctor [R. 56-59, 85]. He saw a doctor daily until January 2 or 3, 1951, obtaining treatment including laying on a hard bed, heat treatments, pills and shots [R. 61-62]. On January 3, he was hospitalized and his legs were put in traction for about 12 days. He remained in the hospital until January 19, 1951 [R. 64-65]. The doctor prescribed a corset which fit around the small of his back. He has been wearing it since the accident and he continued to see the doctor nearly every day for a month and a half, then every day for a month and a half for heat and rubbing treatments [R. 66-68.] For about four to five months he used a cane and finally quit using it at the suggestion of his doctors [R. 69-70].

Plaintiff thought that the diesel engine and three cars struck the two cars on which he had climbed "pretty hard" [R. 70].

At the time of trial he was experiencing pain in the back of his legs and in the small of his back, could not walk freely, could not walk up stairs without pain and had not worked since the injury [R. 73-75]. His earnings at the time of the injury were $12.26 per day, as more specifically set forth in Exhibit 2 [R. 76-78]. Plaintiff had 14 years as a switchman [R. 82].

Plaintiff acknowledged that the engineer operates on the right-hand side of the engine, on the south side, and that signals between the foreman and switchman are passed on the south side of the train; nevertheless, he

climbed on to the train on the north side out of sight of the switchman and engine foreman [R. 91-92]. The track curved so that in order to see the engineer and pass signals it was necessary to be on the south side of the cars and the only way the engineer or fireman could know anyone was on the north side of the cars would be by a signal passed on the south side [R. 93-94]. Switchman Weith was at the west end of the three cars attached to the engine [R. 95].

Plaintiff climbed up the side ladder of the car and crossed over to the end ladder and was placing his right foot on the brake platform which is two or three feet below the top of the car when he was knocked off [R. 102-105]. From his position he was unable to see the lantern of Foreman Mahan or Switchman Weith [R. 107]. He could have climbed up the cars on the south side and thereby have remained within view of other crew members at all times [R. 107-108].

Switchman Weith testified that his job was to follow the engine to make couplings and uncouplings [R. 128-129]. He was standing at the position marked "W" on Exhibit 3 and Foreman was west of him carrying a lantern [R. 133]. The three cars attached to the engine hit the two cars on which plaintiff had climbed [R. 135]; the coupling was unusually hard and would have required a person to have a firm hold to prevent his being knocked off [R. 144].

Mr. Strain, employed as a fireman, was operating the engine at the time of the accident [R. 149-153]. He responded to a kick signal given by lantern [R. 161-163] and "rammed into something hard." He was not aware

that Mr. Seamas was in the area but was not going very fast because he got a slow—easy signal to back up—maybe three to four miles per hour [R. 164-165]. It is customary to receive a stop signal just before a kick is made but on this occasion he received it after the impact [R. 167-168]. Couplings generally are held to four miles per hour or less [R. 173]. This witness' memory was refreshed that he was going about two and one-half miles per hour at the time of the coupling [R. 175; see Ex. B]. Plaintiff showed Mr. Strain his legs where they were skinned [R. 170 but did not mention injuring his back the night of the accident [R. 178].

Trainmaster Wilson testified that the Ajax brake such as that plaintiff intended to release could be released without climbing on the brake platform and can be released from the top of the car [R. 273-276].

Foreman Mahan testified that it was plaintiff's duty to line up switches when he had no cars to ride, set brakes and to assist out in the field [R. 282-283]. He defined a kick move as a quick move [R. 284]. Mahan did not give plaintiff permission to climb on either of the two cars and it was not necessary for a man to get on either car because it is just as well to kick a car with a slight brake on it, if it had one on at all. Nor did Mahan see plaintiff anywhere in the vicinity of the two cars at any time; did not know where he was but supposed he was on the lead track since he had been given a list of the tracks the crew was going to use and was supposed to be lining up switches [R. 286-288]. It is

customary for all of the crew to work on the same side of the engine and cars, on the south side of the track, where everyone can see one another and signals can be passed to the engineer. Foreman Mahan did not give plaintiff permission to get on the cars on the north side of the cars [R. 288-289]. Had Foreman Mahan known that plaintiff was climbing on the cars on the north side of the train he would not have coupled into the cars until he knew plintiff was in a safe place [R. 289-290].

After the accident, plaintiff showed Mahan a minor scratch on his leg which plaintiff claimed he sustained when he was knocked off but he did not mention any injury to his back any time that evening [R. 293]. If plaintiff was going to climb on the cars he is supposed to work on the south side of the engineer's side of the cars [R. 296-297]. If Mr. Seamas had climbed on the car on the engineer's side, he could have climbed on the east end and walked over the top to release to brake and he would have been within the engine foreman's sight [R. 308]. Mahan did not see plaintiff at any time after plaintiff got off the cars at No. 9 switch until after the accident [R. 319].

Seamas had no business on the opposite side from where the signals and work were being given and handled and the foreman would not know he was going to go there unless notified [R. 322]. The foreman was unable to see the brake platform on which plaintiff was climbing because it was on west end of the car (on the

north side) and the foreman was on the east end of the car (south side) [R. 323]; nor did the foreman see any light or reflection of a light from plaintiff's lantern [R. 324].

The Court remarked that "He (the witness) is a bit hard of hearing which is quite evident to the court . . . [R. 325]." Mr. Wilson testified further that switch screws always work on the engineer's side switching cars; that that is standard practice throughout the entire railroad [R. 339]. Moreover, the foreman would expect the crew to be on the side on which he was operating, then he would know their positions at all times, unless the engine foreman gave permission to be elsewhere [R. 340].

Appellee's medical testimony disclosed a diagnosis of an acute bending sprain of the lower back, including derangement of the interverbetral disc and a slight compression fracture of the 3rd lumbar vertebra [R. 203]. The significance of the fracture was said to be an index to show the amount of force used in producing injury to the soft tissues [R. 202 and 198]. On cross-examination it was shown that an X-ray many years earlier showed the same thing that had been diagnosed as a compression fracture arising from the accident [R. 214-217]. Plaintiff suffered a nervous breakdown in 1947 [R. 218], and his apprehension about his injury was moderate [R. 218-219]. He had no muscle spasm in his back in January, 1950 [R. 221], and the doctor did not think appellee had a herniated disc and would not operate on him [R. 222].

IV.

SPECIFICATION OF ERRORS.

1. Erroneous Instruction of the Jury.

The Court gave the Jury the following instruction:

> "When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury." [R. 357.]

To this instruction, appellant's counsel objected at the trial as follows:

> "I believe that instruction is erroneous for the reason that what it does is to tell the jury that the employer, under the federal act, insures the safety of the employee; and for the further reason that the law is that an employee could abide by the general rule of conduct on the part of the defendant, that is, he may anticipate the defendant will exercise ordinary care toward him, and that provisal [*sic* provision?] and condition is not included in the instruction." [R. 372.]

2. Excessive Damages Appearing to Have Been Given Under the Influence of Passion or Prejudice.

V.
ARGUMENT.

1. Erroneous Instruction.

(a) Instructing the Jury That Following the Order of the Foreman Gave the Plaintiff the Right to Assume That He Would Not Be Subjected to Injury Made the Railroad Company the Insurer of His Safety and Charged Appellant With the Duty of Exercising Greater Care Than Ordinary Care and Wholly Excused Any Contributory Negligence on the Plaintiff's Part.

This instruction told the jury that if an employee is obeying an order he has the right to assume that he will not be hurt under any circumstances, provided he had no notice or warning that he would be hurt. The duty of care imposed upon appellant under the Federal Employers Liability Act is the duty to exercise ordinary care. Moreover, plaintiff does not have the right to assume "in the absence of warning or notice to the contrary" that he will not be hurt, but he must at all times exercise reasonable care for his own safety.

45 U. S. C. A., Sec. 51, *et seq.*;

Matthews v. So. Pacific Co. (1936), 15 Cal. App. 2d 36;

Atlantic Coast Line R. Co. v. Tiller, 323 U. S. 574, 89 L. Ed. 465;

Sheaf v. Mpls. St. Paul and S. S. M. R. Co., 162 F. 2d 110;

Spencer v. Atchison Topeka & Santa Fe, 92 Cal. App. 2d 490;

Tennant v. Peoria and P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 520.

Mere happening of an accident provides no basis for finding a defendant railroad liable under the F. E. L. A.

Parrett v. S. P. Co., 73 Cal. App. 2d 30.

The railroad is not an insurer of its employees' safety.

Wilkerson v. McCarthy, 336 U. S. 53, 93 L. Ed. 497.

Although the employee has the right to assume that the railroad will exercise ordinary care

Griswold v. Gardner, 155 F. 2d 333, cert. den., 329 U. S. 725, 91 L. Ed. 628;

Foxe v. S. P. Co., 121 Cal. App. 633;

no case under the F. E. L. A. holds that an employee has a right to assume he will not be subjected to injury in following an order.

The instruction complained of is incomplete in that the jury is told without qualification that the employee has a right to assume that his personal safety is guaranteed in the absence of warning or notice to the contrary. The rule is that the employee must himself exercise ordinary care and failure to do so brands him as guilty of contributory negligence which diminishes damages under the act.

Bernola v. Pennsylvania R. Co., 68 F. 2d 172;

56 C. J. S., Secs. 427 to 430, pp. 1252 to 1256.

Noted under Section 430, *supra,* is the general rule that although an employee has the right to assume that other employees will exercise ordinary care this does not absolve him from caring for his own safety.

Assuming that Foreman Mahan gave plaintiff permission to board the car on one side or the other, plaintiff's instruction 23 is tantamount to a finding by the Court as a matter of law that plaintiff was not guilty of any contributory negligence in the manner of his obedience to the order. The facts of the case do not warrant any such finding by the Court in view of Mr. Seamas' disobedience of the custom of boarding cars on the engineer's side of the train and in the absence of an assurance that the car he boarded would not be moved at all. Moreover, as an experienced switchman he was under a duty to use his eyes and ears and to exercise due care. Although some circumstances justify a finding as a matter of law that plaintiff was entitled to rely on his employer's assurance of safety and is, therefore, not himself contributorily negligent,

> *St. Louis-San Francisco Railroad Co. v. Fine,* 44 S. W. 2d 340;
>
> *Ingram v. Prairie Block Coal Co.* (Mo.), 5 S. W. 2d 413,

usually contributory negligence is a jury question.

Thus, in *Central of Georgia Railroad Company v. Lindsey,* 110 S. E. 636, the Court held that the servant must use ordinary care even though acting under direct command. In this Federal Employers' Liability Act case the Court states that plaintiff is not relieved from negligence because

> "the injury results from his obedience to such a direct and specific command, when it appears that the servant failed to exercise ordinary care, or that the risk was obvious, or that the servant knew or had equal means with the master of knowing of the un-

usual peril involved in a compliance with the command, it is, nevertheless, true that what in any given case amounts to 'ordinary care' is to be determined *by the jury* in the light of all the surrounding facts and circumstances existing at the time of injury, including the issuance of the command by the master to the servant." (Italics supplied.)

In *Wheelock, et al. v. Freiwald,* 66 F. 2d 694, the Court held that under the Federal Employers' Liability Act it was the carrier's duty to exercise ordinary care to protect a switchman in execution of orders from danger but that mere injury while doing ordinary work is not alone sufficient to impose liability. In this case he was told to "look out for the carload of lumber," boarded the car and subsequently fell therefrom.

In *Klein v. Kersey* (Mass., 1940), 29 N. E. 2d 703, plaintiff was injured when horses ran away and claimed assurance from his employer that the horses were safe. The Court held that assuming assurance of safety was given by the employer, nevertheless, the right to rely on such assurance was not absolute and that the general rule is that an assurance of safety renders the care of the workman relying upon it a question of fact in the absence of unusual cidcumstances (see p. 705).

F. W. Woolworth Co. v. Davis, 41 F. 2d 342; cert. den., 282 U. S. 859, 75 L. Ed. 760.

In this case plaintiff walked into an open elevator shaft and the Court held that assurance of safety by the master will not relieve the servant from exercising due care for his own safety.

A servant must exercise ordinary care in obeying the command or order of the master in order to be relieved

of the charge of contributory negligence, even though the order is accompanied by an assurance of safety, especially where, in obeying the command, he was doing a regular part of his ordinary duties. The question of contributory negligence is usually one for the jury.

56 C. J. S., Sec. 467, p. 1307;

P. Bannon Pipe Co. v. Moorman (Ky., 1918), 199 S. W. 802;

Van Duzen Gas and Gasoline Engine Co. v. Schelies (Sup. Ct. Ohio, 1899);

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Illinois Steel Co. v. Schymanowski (Ill.), 44 N. E. 876;

Southern Co-op. Foundry Company v. Elliott (Ga., 1925), 131 S. E. 180.

Integration of Instructions.

While a mere want of accuracy in an instruction is not ground for reversal, an erroneous instruction or a material error in an instruction cannot ordinarily be cured or corrected by giving one which is contary thereto where it is impossible to tell which the jury followed. (*Kauffman v. Maier,* 94 Cal. 260; *Armour & Co. v. Russell,* 144 Fed. 614.) The rule that a charge is to be considered as a whole and that judgment will not be reversed because one paragraph may be defective, if the instructions as a series are correct, does not apply where two instructions are directly in conflict and one is erroneous and prejudicial. (*Drossos v. United States,* 2 F. 2d 538.)

(b) Excessive Damages.

Appellee's alleged injuries or damages are not sufficient to justify a verdict in the sum of $22,500.00; relief on the ground of excessive damages is addressed to the sound discretion of the Court.

S. P. Co. v. Zenkle, 163 F. 2d 453.

Conclusion.

Appellant submits that the jury was told to bring in a verdict for appellee on the mere finding that appellee was injured while carrying out an implied order of the foreman, thus making the railroad liable for any injury sustained by its employees in carrying out an order of a superior, whether or not the railroad exercised ordinary care and whether or not appellee was contributorily negligent. Thus plaintiff's safety was *insured.*

Considering the injury proved to have been sustained by plaintiff, the verdict was excessive and such as to shock the conscience of the Court as having been given under the influence of passion and prejudice.

Respectfully submitted,

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No. 13,246

IN THE

United States Court of Appeals

For the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 13,246

IN THE

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),	*Appellant,*
vs.	
JOSEPH J. SEAMAS,	*Appellee.*

APPELLEE'S REPLY BRIEF.

OPENING STATEMENT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action brought pursuant to the Federal Employees' Liability Act (45 U.S.C.A., Sec. 51 et seq.) to recover damages for injuries alleged to have been sustained as a result of the alleged negligence of the defendant.

The complaint alleged that on December 9, 1950, plaintiff was an employee of the defendant and while acting in the course and scope of his employment at defendants Mormon Yard in the City of Stockton the defendant, its servants, agents and employees negli-

gently and carelessly moved a locomotive engine and railroad box cars as to cause plaintiff to be thrown from a railroad box car onto which he had climbed to operate a hand brake and as a result of which plaintiff was injured (R. 3-6). Plaintiff subsequently and by an order of Court amended his complaint praying for additional damages (R. 9-13).

The defendant answered by way of three affirmative defenses, namely, that plaintiff's own negligence caused and contributed to his injuries and damages, that plaintiff's injuries and damages were solely caused by his own negligence and that plaintiff's injuries and damages were caused by an unavoidable accident (R. 7-8, 13-14).

On the issues thus framed by the pleadings the cause was tried before the Honorable George B. Harris, Judge, presiding, with a jury and resulted in a verdict in favor of the plaintiff for $22,500.00 and judgment on the verdict was duly entered (R. 16-17).

Thereafter, the defendant moved for a new trial (R. 17-19). The motion for a new trial was denied (R. 20) and defendant appealed.

Appellant in its specification of errors complains as follows:

1. That the trial Court erred in giving to the jury appellee's requested instruction No. 23 which reads as follows:

> "When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning

or notice to the contrary, that he would not thereby be subjected to injury." (R. 357.)

and

2. That the damages awarded to the appellee by the jury were so grossly excessive that it appears that they were given under the influence of passion or prejudice.

A brief statement of the facts with applicable references to the transcript of record is as follows:

STATEMENT OF THE CASE.

Appellee was injured in the course and scope of his employment with the appellant Santa Fe Railroad on December 9, 1950, at appellant's Mormon Yard located at Stockton, California (R. 32, 41).

Appellant's railroad tracks involved in this action and as shown by plaintiff's Exhibit 3 for illustrative purposes only are laid out in such a manner so that one track designated as the No. 1 track, but sometimes called the No. 1 lead track converges with another track designated as the No. 10 track, but sometimes called the back lead. The tracks are laid out in a general east-west direction with the No. 1 track being to the north and the No. 10 track being to the south. From the point where the No. 1 track and the No. 10 track converge there is formed a single track designated as the tail track. In the area between the No. 1 track and the No. 10 track are other tracks connected to these two and are designated by numerical sequence. The No. 2, 3, 4, 5 and 6 tracks are connected to the No. 1 track and tracks 7, 8 and 9 are connected with

the No. 10 track. Each of these tracks has a switch located at or near the point where the track connects with either the No. 1 or No. 10 track and these switches are designated as the No. 2, 3, 4, etc., track switch. The tracks curve slightly in a concave manner. (Plaintiff's Exhibit 3 for illustrative purposes only, R. 37-39.)

By this arrangement of the tracks an engine pulls a string of cars towards the east onto the tail track and backs toward the west. When sufficient speed is obtained the pinpuller removes a coupling pin, the engine stops and the released car or cars roll onto a desired track which has had its switch arranged for that purpose.

Appellee, Joseph John Seamas, was a switchman in the employ of the appellant, Santa Fe Railway (R. 29). At the time he was injured he had 14 years experience as a switchman (R. 82). He was injured on December 9, 1950, at appellant's Mormon Yard located at Stockton, California (R. 32), while working as a member of a train crew engaged in making switching movements. Other members of the crew and their respective callings were foreman, L. A. Mahan; switchman (pinpuller), Sidney Albert Weith; fireman, Milton G. Strain; engineer, Bond H. Marrs, and appellee, who was working as a switchman (Fieldman) (R. 34, 35). The acting engineer at the time appellee was injured was fireman, Milton G. Strain (R. 153).

Seamas was injured about 10:00 P. M. It was very dark and there existed at that time an intense tule

fog (R. 37, 130, 131, 153). Immediately prior to this time the crew had coupled a string of five cars to the engine and proceeded along the No. 10 track or back lead in a general easterly direction toward the tail track (R. 42, 131, 153). The east of the string of five cars was destined to go to No. 9 track, and as the engine passed the No. 9 switch Seamas stepped off the cars (R. 42, 46, 47, 155, 284) lined the No. 9 switch and proceeded in a northerly direction toward the No. 3 switch where this track connects with the No. 1 track (R. 45). He then lined No. 3 switch and proceeded in an easterly direction along the No. 1 track to the position of the No. 5 switch where that track connects with the No. 1 track (R. 46) and after lining the No. 5 switch he proceeded toward the No. 6 switch where that track connects with the No. 1 track (R. 44).

At a point between the No. 5 and No. 6 switch, Seamas observed that the last of the five cars which was destined for track No. 9 had been kicked by the engine. This car did not roll as intended but came to rest on the No. 10 track so near the point where the No. 1 and No. 10 tracks converge that this car blocked the path for the next car which was destined to roll along the No. 1 track (R. 44). To avoid injury to the cars Seamas called this to Foreman Mahan's attention. Foreman Mahan did not throw the bull switch and the second car rolled against the first car and coupled on to it (R. 44, 88, 89). Foreman Mahan's position was at the bull switch, and he was directing the switching movements which diverted the cars onto either the No. 1 or No. 10 tracks by

giving lantern signals to the engineer (R. 132-133). Seamas then checked to see that the coupling on these two cars had made and proceeded to the north end of the second car or the eastern most of the two cars where Foreman Mahan was located (R. 44, 89, 90). "He then said to Mahan, 'I am going to go up and check that brake to see whether the brake was set' and he (Mahan) says, 'Okay, kid, go ahead' " (R. 44, 89-90). Seamas then walked on the north side of the two cars, climbed up the ladder on the northwest end of the western most of the two cars to check the brake and when he got to the brake platform he was knocked off (R. 44-45).

While Seamas was in the area of the brake platform and immediately prior to being knocked off Foreman Mahan, who was at the bull switch directing the movements by lantern, signalled acting Engineer Strain to back up and then walked away from the switch (R. 163-164). It was the custom to give a slow signal before cars are coupled and a stop signal just before a coupling is made. This was not done in this instance (R. 134-135, 166-168). The engine with a cut of three cars coupled to it backed up and rammed up against and into the two cars which had stopped (R. 135). The impact was hard (R. 164-165). Immediately after the impact there was a violent stop signal (R. 165-166). The impact knocked Seamas off the brake platform. He fell from a height of 10 to 12 feet on his hands and knees on rough ground north of the position from which he was knocked off (R. 53-54). He was able to get up and experienced a burning pain from his knees on up to the small of

his back (R. 54). Immediately thereafter in response to "Are you hurt son?" asked by Foreman Mahan he replied, "My legs and back are pretty sore" (R. 55).

There was no warning of any kind given to Seamas that this back-up movement was going to be made (R. 50).

Acting Engineer Strain testified that it was customary for the foreman to protect the members of the crew when any member is outside the view of the Engineer (R. 181).

Foreman Mahan denied that he gave Seamas authority to check the brake and denied that he knew that Seamas was in the area of the brake platform (R. 286-290).

Upon completion of the shift Seamas returned home and about 12:00 A. M. that same night, he visited Dr. C. A. Luckey, an orthopedic surgeon who taped his back and gave him some pain pills (R. 59-60, 240-241.) The following day he began to feel worse and called Dr. Weiss, a Santa Fe Company doctor who treated him with heat treatment, pills, shots and advised him to lay on a hard bed (R. 61-62).

On January 3, 1951, he was placed under the care of Dr. C. A. Luckey and was immediately hospitalized at St. Joseph's Hospital a Stockton. He was placed in traction for about 12 days and was released from the hospital on January 19, 1951. Dr. Luckey prescribed a steel brace or corset which fitted around the small of his back which Seamas was still wearing at the time of the trial. He saw Dr. Luckey every day for a month and a half and every other

day for another month and a half for heat and rubbing treatments (R. 64-68). He was able to walk slowly with the aid of a cane and experienced pain even when he walked slowly (R. 70). He discarded the cane after four or five months on the suggestion of the doctors (R. 70). At the request of the railroad company he was examined thoroughly by Dr. Dickson, who took X-rays and advised him to continue with treatments given by Dr. Luckey (R. 71-72). Dr. Dickson did not testify. He was also examined by Dr. McCoy (McCloy) five or six times (R. 72).

At the time of the trial he was experiencing pain in the back of his legs and in the small of his back. He experienced severe pain on backward and forward bending. His lifting power was limited to 15 or 20 pounds. He could not stoop down to pick up objects unless he got down on his hands and knees, and he could not walk up and down stairs without experiencing pain. He had difficulty in sleeping and resting at night and got relief only by sleeping on the floor (R. 73-74).

His health prior to the accident was, "Very Good" (R. 74). He had been hospitalized in 1939 for about a month and after examination by Santa Fe Doctors he was released and returned to work (R. 75-76). He had hurt his hip in 1946 or 1947, lost about ten or fifteen days work and after being released he returned to work (R. 76-77).

At the time of the accident he had been working on a seven day job, and his earnings were between $12.21 to $13.11 per day depending on the work he

was assigned to perform. For the three months immediately preceding the accident he had earned $516.24 for September, $387.38 for October, and $351.38 for November (R. 77-79, Plaintiff's Exhibit No. 2 in evidence). He had not worked since his injury (R. 80). He was 37 years of age (R. 29) and his average life expectancy was 31.75 years (R. 341, 366).

ARGUMENT.

I.

The instruction requested by appellee and given by the Court to the affect that "when a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume, in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury" was a proper instruction.

In support of this instruction plaintiff cited *Republic Iron and Steel Co. v. Berkes,* 70 N.E. 815. The facts of the cited case are substantially as follows:

Plaintiff was an employee of the defendant, engaged as a common laborer in its factory. While engaged in this work, plaintiff was under the control and orders of one Flack, who was a foreman of the defendant at the factory where plaintiff worked.

At the time of the accident plaintiff and another laborer of defendant were directed and required to

cut into small pieces a long, crooked and warped iron bar by means of large iron shears, the jaws of which worked up and down at regular intervals. Immediately prior to the accident plaintiff and the other laborer had placed a bar of iron in the jaws or mouth of the shears, and had pushed it as far back as possible, so that when the knives of the shears came together they would cut the iron into square pieces without turning the bar over.

At this point Flack, the defendant's foreman, called to the plaintiff not to cut the bar of iron at the point where plaintiff was about to cut it, but to cut it at another point.

In obedience to this order given by the foreman, plaintiff began to remove the bar from the shears in order to place it in a position to be cut where the foreman had ordered him to cut it. As plaintiff was in the act of removing the bar, the shears came down and caught the bar of iron and flopped it over against plaintiff's leg injuring him. Plaintiff "had no notice or warning that in attempting to withdraw the bar as he did he would expose himself to any danger or injury".

The jury, on these facts, found for the plaintiff, and from a denial of defendant's motion for a new trial, defendant appealed.

In affirming the decision, the Court held in part that plaintiff's duty as the servant of appellant was to yield obedience to the orders of his superiors. In fact, it appears that he was obeying a specific order of the foreman, under whose control and authority

he had been placed by the master. He had the right to presume, in the absence of warning or notice to the contrary, that in conforming to the order he would not be subjected to injury.

Plaintiff's instruction No. 23 is based upon the law of the *Berkes* case which is in conformity with general principles relating to the rights and duties of an employee or servant who is obeying the orders or commands of his superiors who have direction and control over him. The principal of law encompassed by the instruction is substantially set out in Vol. 16 Cal. Jur. page 1070 where it is said:

> "If the master gives an order to work at a particular place and gives no warning of danger, the servant may rightfully assume, in the absence of information to the contrary, that it is free from danger from causes under the master's control and which he could remove with reasonable care and effort and which are not apparent to the servant after such observation as the circumstances reasonably require."

Citing:

Green v. Varney, 165 Cal. 347, 132 Pac. 436;
Reeve v. Colusa Gas and Electric Co., 152 Cal. 99, 92 Pac. 89;
Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687.

This general rule is especially applicable where an employee is acting under the direct supervision of a foreman or superintendent. The employee is entitled to rely upon the foreman's or superintendent's superior knowledge without being required to make

an examination of his own to see whether the foreman or superintendent has performed his duty.

Price v. Northern Electric Ry. Co., 168 Cal. 173, 142 Pac. 91;

Carl v. San Francisco Bridge Co., 131 Cal. App. 339, 160 Pac. 570;

Petersen v. California Cotton Mills Co., 20 Cal. App. 751, 130 Pac. 169.

The order or direction of the superior to have the employee perform a given task does not have to be express but may be implied from the circumstances.

Miller v. Cookson, 89 Cal. App. 602, 265 Pac. 374.

The rule is inapplicable where the employee is warned of the danger or where the danger is so obvious that an ordinarily prudent person would have noticed it and disobeyed the instruction or order given by the foreman.

Hall v. Clark, 163 Cal. 392, 125 Pac. 1047;

Lemmerman v. Pope & Talbot, 42 Cal. App. 192, 183 Pac. 467.

Generally speaking nothing is law that is not reason and the general principle incompassed by the instruction is based upon the very fact that the master and the servant are not on the same footing. The servant's primary duty is obedience. If he fails to obey, the servant is dismissed from his employment. The servant has a right to rely upon the ability and skill of the master or his agent or foreman in whose charge the

servant has been placed, since the tendency of an order is to throw the servant off his guard.

The servant has a right to assume that the master has performed his duty since the servant shapes his course of conduct in reliance on this principle that the master has done his duty, and he cannot be charged with contributory negligence for having obeyed the order of his superior in an action for injuries received in attempting to follow the order.

Southern R. Co. v. Hart, 1901, 23 Ky. L. Rep. 1054, 64 S.W. 650.

This is especially true in the instant case since the evidence discloses that it was the custom to have the foreman protect the men when they were working outside the view of the engineer (R. 181).

Appellee's instruction No. 23 does not mean, as appellant asserts, that no employee has a right to assume, when obeying an order, that the employee will not be hurt under any circumstances. It means in substance nothing more than that, in obeying an order of his superior, the employee, has a right to assume that the employer has exercised ordinary care for the employee's safety when the employee acts in pursuance of the order or command. A fair and reasonable interpretation of this language found in the instruction complained of can give it only this meaning. The instruction can only be interpreted to mean that the employee does not assume the risk of his employment. It merely states the law of the 1939 amendment to the Federal Employers' Liability Act which

obliterated from the Act the doctrine of the assumption of risk as a defense.

45 U.S.C.A. Section 51, et seq;

Larsen v. Chicago & N. W. Ry. Co., 171 Fed. (2d) 841.

The instruction was proper and appropriate under the facts and circumstances and especially in the light of Mr. Mahan's testimony on direct examination in this regard (R. 289):

"Q. Is he permitted without permission from you to get on the north side of the cars?

A. Well, not necessarily. *He got on there at his own risk.*" Emphasis added.

In a similar case a switchman working under orders of a foreman in "kicking" cars upon a switch track at night did not assume the responsibility or risk of such movement.

Cinn. N. O. & T. P. Ry. Co. v. McGuffy, 252 Fed. 25, 164 C.C.A. 137.

Appellant assumes that appellee was guilty of contributory negligence merely because of the usual custom of the train crew to work on the engineer's side of the tracks, or the south side of the tracks, but there is nothing in the evidence to indicate that any custom existed of boarding or going onto box cars, which had stopped on the engineer's side to test a hand brake which was suspected to have been stuck. By the implied verdict of the jury it is reasonable to assume that appellee had gone to the place where he had been impliedly ordered to go, that Mr. Mahan knew that

he was in the area of the hand brake and that Mr. Mahan failed to protect appellee when he was outside the view of the engineer in violation of established custom (R. 181). There is nothing in the evidence to indicate appellee was guilty of contributory negligence. There was no warning given to him that a back-up movement was going to be made (R. 50), and there was no evidence that appellee had any knowledge that the movement was being made.

Appellant has cited numerous authorities which set forth general principles of law applicable to a case brought under the Federal Employers' Liability Act which were appropriately covered by the trial Court in its charge to the jury. The trial Court instructed on appellant's duty to use ordinary care (R. 362-363). It instructed on contributory negligence and its affect on a case brought under the Federal Employers' Liability Act. The Court further charged the jury as follows (R. 358):

> "I further charge you that the railroad company does not insure or guarantee its employees against the possibility of accident. Its duty is to exercise ordinary care. Insofar as it performs that duty, it fulfills the law and incurs no liability for accidental injury. Inherent in the nature of a railroad business are certain hazards, but even such dangers do not make the company an insurer or change the rule of liability that I have stated, although, in the exercise of ordinary care, the amount of caution required increases as does the danger that is known or that reasonably should be apprehended in the situation."

Appellant has not called our attention to any other instruction given by the trial Court which appears to be contrary to or inconsistent with Appellee's Instruction No. 23. The instructions given by the Court must be taken and looked upon as a whole. A party cannot be heard to complain of a deficiency in one instruction when the deficiency complained of is adequately and properly covered by other instructions given by the Court. The instructions given should be considered in connection with each other, and if the charge as a whole fairly and accurately states the law, a new trial should not be had because isolated sentences and phrases may be open to criticism, or because a separate instruction may not contain all of the conditions and limitations which are to be gathered from the entire charge to the jury.

Cavagnaro v. City of Napa, 86 Cal. App. (2d) 517, 195 Pac. (2d) 25;

Wood v. Moore, 64 Cal. App. (2d) 144, 148 Pac. (2d) 91.

There are no authorities which even suggest the untenable interpretation which defendant seeks to give plaintiff's instruction.

There is nothing in the instruction to suggest that defendant was prejudicial thereby.

II.

The damages awarded to appellee are not excessive. It does not appear from appellant's opening brief upon what ground or grounds appellant relies in its

complaint that the verdict of $22,500.00 was excessive and relief upon this ground is addressed to the sound discretion of the Court.

The verdict here is really very moderate, in view of the severity and permanency of the injuries and the high earning capacity of appellee. His injuries were in the main soft tissue injuries between the lumbar region and the sacrum. The injuries included the joints of the spine, the ligaments around the joints, and the rest of the soft tissue structure such as the intervertebrae disc with a derangement of the intervertebral disc of the third lumbar vertebrae (R. 200-207).

It would serve no useful purpose to fill the pages of this brief with citations of and excerpts from other cases where verdicts were held not excessive. It is therefore more appropriate to summarize briefly for the Court the evidence which supports the verdict and the elements of damage which must have unquestionably been considered by the jury:

1. Present loss of earnings as an element of damages.

Appellee is 37 years old. He has an average life expectancy of approximately 31.75 years (R. 341, 366). For the period immediately preceding the accident out of which this cause of action arose and representing about one year, appellee had earned a little over $4,477.19 or an average of some $375.00 per month, up to the time of the trial of this cause appellee's loss of earnings were approximately $4,125.00 (Plaintiff's Exhibit No. 2 in evidence). Present loss

of time and earnings are universally considered as a proper element of damages.

Chicago D. & G. B. Transit Co. v. Moore, 259 Fed. 490, 170 C.C.A. 466, certiorari denied 40 Sup. Ct. 118, 251 U.S. 553, 64 L. Ed. 411.

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2. Future loss of earnings reasonably to be anticipated as an element of damages.

Future loss of earnings and impairment of earning capacity are properly considered as an element of damages when they are reasonably to be anticipated.

25 Corpus Juris Secundum, Section 87, p. 619.

Dr. Neil P. McCloy testified (R. 204):

Q. And do you feel that he will be able to carry on his duties as a switchman in the future?

A. I think it may be possible in a year or two, but I rather feel it would be improbable——

Q. Do you feel——

A. Pardon me—because of the nature of the work, which requires a great deal of climbing and agility.

Q. Do you feel that he would be better off by doing lighter work?

A. Yes, I do.

He further testified (R. 203):

Q. Mr. McCloy, have you reached an opinion as to whether or not the injuries which Mr. Seamas has suffered are permanent?

A. Mr. Seamas has sustained some permanent injuries which will consist of pain in his lower back in extremes of motion, and approximately 20 to 25 degrees restriction of the motions of forward and backward bending, and bending to

the right, together with some weakness of the back, and pain in the back on hard use.

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3. Present and future physical pain, suffering and discomfort as an element of damages.

As Dr. McCloy testified (R. 204) there can be little doubt that an injury which produces permanent changes and permanent disability can be readily classified as severe. The distress suffered by a person with a severe back injury is almost always acute. It is a portion of the human anatomy which of necessity we are required to use constantly, even in turning over in our sleep. Appellee has suffered considerable pain and will continue to experience pain in the future on hard use. He has difficulty in resting and sleeping. He is required to sleep on a hard surface and quite frequently he must resort to sleeping on the floor to obtain relief (R. 73-74).

He was treated by Dr. Weiss for a period of one month, and by Dr. Luckey for a period from January 3, 1951, until about July 26, 1951. Appellee was seen by these doctors every day for many weeks, then the visits were decreased gradually to twice each week. It is reasonable to assume that appellee is and was in considerable distress or these gentlemen would not have continued treating him. He was hospitalized and placed in traction for a period of ten to twelve days. He has been wearing a brace for many months, and he will have to continue its use for several more months until after a period of exercise therapy he is able to support himself (R. 228-229).

On present and future pain, suffering and discomfort as an element of damage see:

25 Corpus Juris Secundum, Section 62, p. 548.

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4. Mental disturbance, suffering and emotional shock as an element of damage.

It was admitted by both Dr. McCloy and Dr. Luckey that appellee was not malingering and that his posture is not a feigned posture (R. 191, 229, 248). Plaintiff's mental condition has suffered and has been severely disturbed. (Dr. McCloy called this condition apprehension (R. 219) and Dr. Luckey attributed appellee's mental condition to traumatic neurosis or a functional overlay (R. 265-266). Both doctors agreed that this mental condition was associated with the accident, and it will prolong appellee's pain and suffering and his recovery will consequently be retarded (R. 218, 220, 227). It is an element of damage which the jury properly considered in its verdict.

Mental suffering constitutes an aggrevation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.

Deevy v. Tassi, 21 Cal. (2d) 109, 130 Pac. (2d) 389, on hearing after 50 A.C.A. 377, 122 Pac. (2d) 942.

This case is prosecuted under Federal Law. The extent of future disability is a factual question for

the jury. That fact finding body had the right to accept as true, any testimony, regardless of conflict. We deem it appropriate to quote the following language of the Supreme Court of the United States in a decision handed down March 25, 1946, in the case of *Lavender v. Kurn,* 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, at page 922:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weight the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 68; 87 L.Ed. 610, 617, 618; 63 S. Ct. 444; 143 A.L.R. 967; Bailey v. Central Vermont R. Co. 319 U.S. 350, 353, 354; 87 L. Ed. 1444, 1447, 1448; 63 S. Ct. 1062; Tennant v. Peoria & P. U.R. Co., 321 U.S. 29, 35; 89 L. Ed. 520, 525, 64 S. Ct. 409; 15 N.C.C.A. (NS) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act', 29 Marquette L. Rev. 73.
>
> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible

> error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In summary it may be rightfully stated that appellee has been railroading nearly all of his working life. It is the only calling that he has had training for. It is the only work he is familiar with and knows how to do. As a result of this accident, it may honestly be said that he is finished and through railroading. Certainly no railroad company would want to hire appellee in view of his permanent back condition. It is certain that appellant does not want appellee to return to his former work as a switchman. In view of the condition of appellee's back, he will be required to seek employment in some field of endeavor requiring much less agility and strength.

Taking into consideration these elements of damage which we may assume the jury properly considered, it cannot be said that the verdict was given under the influence of passion or prejudice. The jury was entitled to consider all these elements of damage in arriving at a fair conclusion and their verdict is supported by substantial evidence. There is nothing in the verdict which at first blush would shock the conscience of the Court. In view of appellee's in-

juries and permanent disability even a larger verdict would have been proper.

We respectfully contend that the judgment should be affirmed.

Dated, Stockton, California,
May 26, 1952.

Respectfully submitted,
MICHAEL AND PAPAS,
Attorneys for Appellee.

No. 13246

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLANT'S CLOSING BRIEF.

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THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLANT'S CLOSING BRIEF.

I.

The Authorities Cited by the Appellant Are Directed to Specific Orders and to the Doctrine of Assumption of Risk Which Is Not an Issue in This Case.

The case of *Republic Iron and Steel Co. v. Berkes,* 70 N. E. 815, relied on by appellee (Appellee's Reply Brief, p. 9) is clearly distinguishable from our case for several reasons. That case involved an order *directing the particular way* in which the work was to be done. The plaintiff in that case had no time to reflect upon the manner of doing the work. Finally, the decision by the Court is a finding as a matter of law on the particular facts and does not approve the language used in appellee's in-

struction number 23 as a proper instruction to be given to a jury.

The quotation from 16 Cal. Jur., page 1070 (Appellee's Reply Brief, pp. 11 and 12) and cases cited thereunder are assumption of risk cases and do not deal with the issue of contributory negligence. They stand for the legal proposition that the employee is entitled to assume that the master has exercised reasonable care to furnish a reasonably safe *place* to work or a safe tool.

Price v. Northern Electric Co., 168 Cal. 173, 142 Pac. 91 (Appellee's Reply Brief, p. 12), holds that the employee is not guilty of negligence as a mater of law because he obeyed instructions to work on an unsafe bent and the work was rushed.

Petersen v. California Cotton Mills Co., 20 Cal. App. 751, 130 Pac. 169 (Appellee's Reply Brief, p. 12), holds that it was not error to charge the jury that in considering the degree of care exercised by the servant the fact that servant was acting under orders might be taken into account, and that the fact he had been ordered into a position of danger is an element to consider in determining whether he exercised ordinary care.

II.

The Jury Was Erroneously Instructed That an Employee Following an Implied Order Could Assume He Would Not Be Hurt.

See instruction number 23 (Appellee's Reply Brief, p. 21).

Appellee had a choice between getting aboard the car within sight of other members of the crew—the safe way—or on the opposite side of the train. He chose to board the car on the opposite side from the crew. (See *Schwind v. Floriston Pulp & Paper Co.,* 5 Cal. App. 197, 89 Pac. 1060 (choice between safe and unsafe way).) Assuming that appellee was permitted to board the car, nowhere does the record disclose that he was permitted by the foreman to board the car *on the opposite side* of the train. By so doing he disregarded the long established custom of working on the engineer's side of the train where signals were being passed, and where his lantern could be seen at all times. [See Foreman Mahan's testimony at pages R. 288, 297, 308, and 322-4, and Trainmaster Wilson's testimony, R. 340.] Moreover, appellee should have known the engine foreman was going to couple into the car. [R. 289.] Appellee's activities raised a jury question as to whether he exercised ordinary care for his own safety. Instruction number 23 excused any possible negligence on his part.

Appellee argues at page 15 of his brief that the jury was instructed that the railroad does not insure its employees against accidents. Instruction number 23, however, raised a conflict with this instruction and provided an exception to it. Instruction number 23 entitled the jury to find that if appellee was following the order of his foreman and was not warned or notified that in so

doing he would be injured, he was entitled to assume he would not be hurt regardless of his own activity, whether negligent or not, and regardless of whether or not the implied order was general or specific or given in the exercise of reasonable care by the engine foreman.

In the instant case the implied order permitted appellee to get aboard the car for the purpose of inspecting the brakes was, at most, a *general order.* The *manner* in which appellee carried out an implied general order raised the issue of contributory negligence, a question which the jury should have been permitted to determine.

See the following authorities:

56 C. J. S. page 1307, Master and Servant, Section 467:

> "A servant must exercise ordinary care in obeying the command or orders of the master, or of a superior, in order to be relieved of the charge of contributory negligence." (See footnotes 13 and 14.)

39 C. J., page 899, Master and Servant, Section 1123 (The manner of carrying out the order rather than the mere fact the servant obeyed it may be the cause of the injury, footnote 91.)

Nichols v. Oregon-Washington R. and Nav. Co. (Wash., 1922), 206 Pac. 939 (Holding that the general rule is that a servant who, while obeying a master's orders, was injured because of some act of negligence on his part, which is in no wise the proximate result of the order, cannot rely on the master's order to relieve him of the effects of his own negligence. "The driver was told what to do—not how to do it," p. 940.)

This case quotes from Labatt, *Master and Servant,* (2nd Ed., Sec. 1368) to the effect that the servant is not relieved of the charge of contributory negligence where he is hurt by the negligent manner in which he executes a general order, provided he was not ordered to pursue a particular course of conduct.

Conclusion.

Appellant submits that instruction number 23 made appellant absolutely liable for any injury sustained by appellee in following the foreman's implied order, thus insuring his safety and denying to appellant the benefit of any reduction in damages because of any contributory negligence which the jury was entitled to consider concerning the manner in which appellee carried out any implied order.

Respectfully submitted,

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No. 13252

United States
COURT OF APPEALS
for the Ninth Circuit

RICHARD C. GILLIS,

Appellant,

vs.

COMPAGNIE GENERALE TRANS-ATLANTIQUE,

Appellee.

BRIEF OF APPELLEE

Upon an Appeal from a Decree of the United States District Court for the District of Oregon, in Admiralty.

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No. 13252

United States
COURT OF APPEALS
for the Ninth Circuit

RICHARD C. GILLIS,

Appellant,

vs.

COMPAGNIE GENERALE TRANS-ATLANTIQUE,

Appellee.

BRIEF OF APPELLEE

Upon an Appeal from a Decree of the United States District Court for the District of Oregon, in Admiralty.

Appellee has pending before this Court a motion to dismiss this appeal as sham and frivolous, and has been notified by the Clerk that the Court has continued a hearing on that motion until such time as the appeal may be heard on the record, so that both may be considered together. We therefore address this brief to both phases of the case.

MOTION TO DISMISS

Appellant has attempted to bring the case before this Court merely upon the Findings of the Trial Court

and certain exhibits, without any transcript of the testimony. Such a transcript of testimony is essential to any proper consideration of the case. Appellant recognizes this, as is evidenced by his application to the District Court to have the testimony transcribed at government expense, and by his renewal of such application in this Court. The District Court denied the application because he found that there was no "substantial question" involved (R. 27). This Court has likewise denied the application.

There is really nothing before this Court on which it could base a decree. Nor would any remand to the District Court be effectual to accomplish anything, for the District Court, on a hearing of the whole case, has already decided that the ship was neither negligent nor unseaworthy, and that all of libelant's contentions were unfounded. On a remand, it could only reiterate this.

Since this Court has nothing before it on which to base a decree, and since a remand would accomplish nothing, we submit that there is nothing left to do but to dismiss the appeal. Without the transcript of the testimony, this case is like the play of "Hamlet" without Hamlet.

A further reason for dismissing the appeal, beside the technical points urged in our motion, is that the respondent ship was not a party to the Stevedoring Contract, which, it is claimed by appellant, draws in the Safety Code by reference; and even if it had been, this suit is not based on any contract, but on the conventional grounds of unseaworthiness and negligence, as

to both of which the Court has found against appellant. But we reserve a further discussion of this for our argument on appellant's contentions.

DISCUSSION OF APPELLANT'S CONTENTIONS

We were about to entitle this,—"On the Merits". But it would be a misnomer. Lacking the transcript of the testimony, it is impossible to consider this case "on the merits". We therefore adopt the above title.

Appellant contends that the District Court's Findings are not in conformity with the so-called "Safety Code", Libelant's Ex. 4, which is a part of the Pacific Coast Longshore Agreement, Libelant's Ex. 7; and that this agreement is a "labor agreement" to which the shipowner is bound to conform because the shipowner's stevedoring contract, Libelant's Exhibit 5, says in Clause 3 that

> "It is understood and agreed that, in the execution of the work under this contract, the provisions of any *labor agreement* existing between the longshoremen and/or other labor groups and the waterfront employers governing (or in the absence of such labor agreement, any regulations or current practices of the port applicable to) longshore work performed in the ports in the Columbia River District shall be observed." (Italics ours)

We believe the meaning of this clause was explained in the testimony which is missing. Without that testimony this Court is left in the dark. This is but one more illustration of how necessary to a proper consideration of this case is that missing testimony.

It is plain to us that since the libel alleged, as a basis for recovery, "unseaworthiness" and "negligence"; and since the Trial Court, having all the evidence before it, including the Safety Code, as it was interpreted by the testimony, decided against libelant on each of those issues, the case should end here. But since appellant contends that the Court's Findings infringed the Safety Code, and since this Honorable Court has ordered the case to proceed to a hearing, it becomes necessary to consider appellant's contentions.

Since appellant contends that the Court's Findings infringe the Safety Code, the burden is surely on appellant to show that. We submit that he has nowhere done so. Here again it seems to us that we could rest and say no more. But we shall go further; for we believe that, even under the handicap of lacking the testimony, we can show affirmatively, by comparing the Safety Code with the Court's Findings, that the two are in no way inconsistent.

In the first place, it should be noted that the Safety Code is merely an attempt to "apportion" the duties of the ship, stevedore and longshoremen in stevedoring operations. Section II on Page 6 of the Safety Code makes this plain by its heading,—"APPORTIONMENT OF DUTIES", and a reading of its various rules shows that it is, in general, no more than a statement of the maritime law, as applied by the Admiralty Courts to such operations.

The second thing to be noted about the Code is that it is not rigid, but is elastic in its application, and pro-

vides for exceptions as indicated by Rule 102, on Page 5 of the Code.

That Rules is:—

> "Rule 102. The purpose of this Code is to provide minimum requirements for safety of life, limb and health. In cases of practical difficulty or unnecessary hardship an employer or ship may make exceptions from the literal requirements of this Code and permit the use of other devices or methods, but only when it is clearly evident that equivalent protection is provided."

It will thus be seen that the Code is not a hard and fast set of rules, but permits considerable latitude in departing from them as circumstances may require.

We shall now consider Appellant's Points seriatim.

APPELLANT'S POINT I

Brief, P. 20

Appellant objects to this Finding of the Trial Court:

> "Libelant's job was that of hatch tender, known also as signal man and safety man. It was his duty to give the necessary hand signals to the winch driver to raise and lower the cargo lifts, and also to see that the working conditions and lighting were safe for himself and the other longshoremen in his gang." R. 16, (in blue), subpage 3.

This was amply supported by the testimony, but the objection is that it did not conform to the so-called Safety Code. It is hard for us to understand why, when the Code itself expressly provided:

> "Rule 207. The safety duties of the person designated as *hatch tender* or signal man, are:

"(a) To consider himself as the *safety man* for the gang, and for this purpose to cooperate with his foreman or walking boss or other employer representative on the job for the safety of the men during operations.

"(b) To see that all ship's cargo handling gear is at all times properly secured and in apparent safe working condition and that the space over which he has to travel in following the hook is clear of obstructions." (Quoted in Appellant's Brief, Page 22) (Italics ours)

It is undisputed that libelant was the *hatch tender,* and this Rule 207 expressly designates him as the *safety man* for his gang. The Court's Finding merely gave effect to this Rule 207. Even without the testimony it is apparent that this is so. But with the testimony it was clear beyond per adventure. And again we must reiterate that this case was tried, not on the Safety Code alone, but on the *whole evidence,* of which the Safety Code was merely a part.

APPELLANT'S POINT II

Brief, P. 23

Appellant objects to a part of the Court's Finding No. VIII, as follows:

" . . . ; that the longshoremen continued working both before and after the accident under the same lighting conditions for two nights; that the stevedore company had available at the same dock a supply of additional lights that could have been used to supplement the ship's lights if needed, but which were not used; and that the lighting was the same as usually and ordinarily provided for stevedoring work at night."

The point of appellant's objection is that this did not conform to the stevedoring contract, which obligated the steamship company to furnish lights. Brief, Pages 24, 25.

The complete irrelevancy of the objection is shown by the fact that the Court expressly found, on ample testimony, that the ship *did* furnish lights ("the lighting on the deck came from the *ship's regular mast lights* and the string of lights on the dock"); and further found "that the *lighting was adequate and sufficient,* and libelant has not sustained the burden of proof on that claim". (Italics ours) Finding No. VIII, R. 16 (in blue), subpage 4. Also set forth in Appellant's Brief on Pages 10 and 11.

APPELLANT'S POINT III

Brief, P. 25

Appellant objects to the Court's Findings IX, X, XI and XII, on the ground that they conflict with the Safety Code, particularly with Rule 201 that the shipowner shall provide "safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship". Brief, Page 28.

This Rule 201, however, must be read in connection with its immediately following Rule 202. The two together are a general statement of the "APPORTIONMENT OF DUTIES", which is the heading for both of them. We set them forth here:—

"APPORTIONMENT OF DUTIES

"Rule 201. The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship.

"Rule 202. The employer shall provide, so far as the same shall be under his control, a safe working place for all operations."

Reading these two together, and applying the maxim of *ejusdem generis* to Rule 201, we think they merely mean that the ship shall supply safe "gear and equipment" and a "safe working place" as related to those specific things; but that all details of the work, such as covering hatches, arranging booms, turning on or adjusting lights, building walkways or temporary ladders, shoring up cargo, etc. shall be done by the stevedore. In short, these, and the other many Rules in the Code, merely state the general practice of stevedoring, as amply explained in the missing testimony, and as commonly understood, and in fact as applied generally in the Admiralty Courts.

Appellant says that Findings IX, X, XI and XII infringe these Rules. Let us therefore turn to these Findings.

Finding No. IX relates to thwartships walkways and is as follows:—

"IX.

"The Court finds that it is usual and customary for ships, and particularly foreign ships, to have deckloads of logs stowed in the manner described; *that whether a thrwartships walkway across the*

> *logs for the use of the hatchtender is necessary is a matter determined by the longshoremen themselves, and particularly by the hatchtender; that if such a walkway is needed, the longshoremen build it themselves; that this is a simple task consisting of laying a few planks or dunnage, across the deckload and can be done in a short time by one or two of the longshore gang; that the ship's mate, officers, and crew have nothing to do with the placing or construction of such a walkway;* that the longshoremen worked at #5 hatch and other hatches under similar conditions for two nights without a thwartships walkway; *that a thwartships walkway was not necessary to make the place reasonably safe to work;* that if such a walkway was necessary, *then by custom and practice it was the obligation of the stevedore company, and not the ship, to provide such walkway. The Court finds the ship was not unseaworthy, and its operators were not negligent, in failing to provide a thwartships walkway."* R 16 (in blue), subpage 5. (Italics ours)

This Finding is also set forth on Pages 25 and 26 of Appellant's Brief.

This Finding is not merely amply supported by all the testimony (even by the testimony of libelant's own witnesses, if it were here), but is doubly reenforced by the Safety Code itself. For Rule 811 says:

> "When working cargo over a deckload, a safe walkway from rail to coaming shall be provided for the designated signal man."

It does not say *by whom.* But its context shows that it is the duty of the stevedore, not the ship; for it occurs in a set of rules plainly having to do with the stevedore's functions. Indeed, not merely is Rule 811 a duty of the stevedore, but more particularly it was a

duty of *libelant himself,* as the hatchtender and "safety man" of the gang. Rule 207.

All of the foregoing is clear enough from the internal evidence of the Rules themselves.

The missing testimony, however, made it incontestable and amply supported the Judge's Finding No. IX as above quoted.

Appellant's next objection under Point III is to Finding No. X. Brief, P. 26.

This Finding, which is set forth in the Record at Sub-Pages 4 and 5 of (Blue) Page 16, and again on Pages 26 and 27 of Appellant's Brief, relates to fore and aft catwalks over a deckload and a ladder (from the deck to the deck load).

Inasmuch as the Court expressly found that such catwalks are ordinarily built by the stevedore company only when requested by the ship; and only after all cargo is loaded and the ship is ready for sea; and that such a catwalk would be of no use to the hatchtender going back and forth across the logs; and that such a catwalk was not necessary or usual to make the place reasonably safe; and that "the absence of such a catwalk *had no causal connection with the accident";* and that "the absence of a ladder *had no causal connection with the accident",*—it is difficult to see how this Finding could in anyway infringe the Safety Code, or that it would make any difference even if it did.

Again we say, which cannot be too often repeated, that this Finding is amply supported by the evidence, even by libelant's own witness, the walking boss.

Appellant's next objection is to the Court's Finding No. XI, that the logs were wet, but that there was no proof that they were covered with oil or other foreign substances other than there was some grease on the cable lashings. Sub-Page 6 of P. 16 (blue) of the Record; also Appellant's Brief, P. 27.

Again there is nothing in this Finding that conflicts with the Code, and even if there were, it would not make any difference, because the Court expressly found that there was no proof that libelant fell because he stepped on oil or grease, and found that he fell because a piece of bark came off the log. All, again amply supported by the testimony.

Appellant's last and final objection is to Finding No. XII. This will be found at Sub-Page 6, Page 16 (blue) of the Record, and again at Page 27 of Appellant's Brief. The Finding is:

> "The Court finds that libelant has not sustained the burden of proof that the vessel was unseaworthy, or its operators negligent, or that his accident was caused by unseaworthiness of the vessel or negligence of its operators."

This Finding in no way conflicts with the Safety Code; was amply supported by the evidence, and disposes of the whole case.

To conclude this part of our argument, the Safety Code was only one factor of the case; only one piece of evidence. The most important evidence was that of the witnesses, both for libelant and claimant; for these not only interpreted and explained the application of the Safety Code to longshore operations, but laid before

the Trial Court the whole detail of this accident. And it was on that whole record that the Court based his decision. That record made it plain, not merely that the Safety Code was not infringed, but that the operations were conducted in accordance with the Code, and that libelant slipped because a piece of bark came off a log, and the ship was not negligent or unseaworthy in any way.

THE SHIP WAS NOT A PARTY TO THE CONTRACT

What we have already said disposes of this appeal, and what we now add is, therefore, not really necessary to a decision. But if it were, we point out that this was a suit *in rem,* and the ship, as such, was not a party to any contract, Safety Code or otherwise. Suits in rem are based on a *maritime lien.* No suit in rem can exist unless there is a maritime lien on the ship. Such liens are " '*stricti juris*' and cannot be extended by construction, analogy or inference". Osaka Shosen Kaisha v. Pacific Export Lumber Co. (The Saigon Maru), 260 U.S. 490, 497; 67 L. Ed. 364, 366. The fact that the owner appears and claims the ship never alters the nature of the case; it remains throughout a suit in rem. How then can this ship be bound by any contractual obligation to observe the Safety Code? It is bound only by the maritime law as understood and applied in the Admiralty Courts. We do not think any Safety Code could set that law aside. As a matter of fact, however, in this case that question hardly arises because the Safety Code in general follows the well understood principles of the maritime law.

CONCLUSION

In conclusion, we submit that since, as the Trial Judge has certified, there is no "substantial question" involved in this appeal, it should be dismissed; but if not dismissed, then the decree should be affirmed.

Respectfully submitted,

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No. 13253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST GRANVILLE BOOTH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 13253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST GRANVILLE BOOTH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

The appellant's Petition for Writ of Habeas Corpus in the Court below was presumably authorized by Sections 2241, *et seq.* of Title 28, United States Code. The appellee contends that Section 2255 of Title 28, United States Code, foreclosed the appellant from asking a Writ of Habeas Corpus in the absence of a showing that his remedies under Section 2255 were inadequate or ineffective to test the legality of his detention. Appeal to this Court is authorized by Section 2253 of said Title 28.

Statement of the Case.

A Statement of Facts has been furnished in this brief to afford the Court an outline of the numerous proceedings that have taken place, most of which form the basis for one objection or another of the appellant.

Briefly, the appellant, by Motions to Vacate Judgments, claimed that he was coerced into pleas of guilty and improperly arraigned. When his motions were denied, he did not appeal. Later he asked that a Writ of Habeas Corpus issue. The petition for the Writ was denied, but opened new fields for complaint by the appellant. The Court held that appellant was in state custody under state judgments of conviction and that, as no attack was made on the state judgments, the Writ would not issue. As there was no state officer that the Order to Show Cause could be directed to, the Court directed the Order to Show Cause to the United States Marshal merely to bring the matter properly before the Court. Appellant complains of this. He alleges that he was not given a hearing but it is believed that this Court will find that his claims are based on misstatements and misquotations and that he did in fact have a full and fair hearing in each stage of his proceedings.

The appellee contends that all of the complaints levied against the Habeas Corpus proceedings are irrelevant because the Writ should not have been granted in any case due to the limitations laid down by Section 2255, Title 28, United States Code, and the interpretation thereof by the United States Supreme Court, in the case of *United States of America v. Hayman,* 342 U. S. 205, and by this Court in *Fred Dwight Jones v. Squier* (Warden), Case No. 13200, and *Willard A. Winhoven v. Swope* (Warden), Case No. 12933, both decided February 28, 1952.

Statement of Facts.

In the year 1943, the appellant was convicted of theft from interstate shipment on Count 4 of an indictment in an action entitled "United States v. Ernest Booth, *et al.*," Case No. 16167, before United States District Judge Ben Harrison. The case was reversed by the Ninth Court of Appeals for an error in one of the instructions to the jury.

In the year 1947 the appellant was apprehended and indicted in an action entitled "United States v. Ernest Granville Booth," Case No. 19263, charging bank robbery. At the time of his arrest, he had not been retried in action No. 16167, the theft case referred to above.

On April 21, 1947, the appellant appeared before United States District Judge Jacob Weinberger for arraignment and plea [Tr. p. 103]. At that time, he was represented by his counsel, Mr. Morris Lavine, who requested that the proceedings in the District Court be delayed to permit the appellant to plead to similar robbery charges in the State Court before entering a plea in Federal Court [R. T. April 21, 1947, p. 1]. This request was granted and the matter continued until May 5, 1947 [R. T. April 21, 1947, p. 2]. Subsequent continuances were granted.

On May 19, 1947, appellant was sentenced in the State Court proceedings. On May 28, 1947 an order was issued by United States District Judge Paul J. McCormick directing the United States Marshal to release the appellant to the Sheriff of Los Angeles County so that he might enter upon the service of the state sentence [Tr. p. 80].

Appellant finally appeared before Judge Weinberger on June 6, 1947, at which time he was again represented by his counsel, Mr. Lavine [R. T. June 6, 1947, p. 3].

Mr. Lavine asked leave to withdraw the plea previously entered as to Count One of the Indictment in Case No. 19263 for the purpose of entering a new and different plea [*id.* p. 3]. The Court asked if there had been an arraignment. The Assistant United States Attorney said that there had been an arraignment [*id.* p. 4]. Mr. Lavine did not contest this. Mr. Lavine then said the appellant would waive the indictment [*id.* p. 4]. The Court asked the appellant personally if he wanted the indictment read. He replied "no," [*id.* p. 4]. The Court apparently was still not satisfied, so he ordered the indictment read to the appellant [*id.* p. 4]. Thereafter the appellant entered a plea of guilty [*id.* p. 5]. Appellant pleaded not guilty to Count Two of the indictment. This count was dismissed after sentence. The appellant then asked leave of the Court, through Mr. Lavine, to withdraw his plea to Count Four of Indictment No. 16167, the 1943 theft case [*id.* p. 5]. The clerk read Count Four of Indictment No. 16167 and then read Count Three thereof which formed the basis for Count Four. This was the only remaining count in this indictment, appellant having been acquitted on Count Three in 1943. Appellant then entered a plea of guilty to Count Four [*id.* p. 6].

Thereafter, Mr. Lavine stated that appellant was ready for sentence and that he had pleaded guilty to similar charges in State Court and had been sentenced there. He asked the Court to impose a sentence concurrent with that in the State Court [*id.* p. 11]. Upon ascertaining that appellant had been sentenced to from 10 years to life in the State Court, Judge Weinberger imposed a sentence

of 5 years in Case No. 16167 to be followed by a sentence of 15 years in Case No. 19263, both sentences to run concurrently with the sentence in the State Court or so much thereof as might remain unserved [*id.* pp. 21, 22; Tr. pp. 98, 105].

On July 10, 1950, appellant filed a Motion to Vacate, Set Aside and Declare Void judgments of conviction and sentences in Case Nos. 16167 and 19263 [Tr. p. 84].

By a memorandum of conclusions on Motion to Vacate Judgment, dated December 21, 1950 [Tr. p. 150], Judge Weinberger discussed the motions at great length. The motions had been filed *in propria persona* but the Court appointed Morris Lavine as counsel. The motion had alleged coercion on the part of an Agent of the Federal Bureau of Investigation as wrongfully inducing the pleas of guilty. The United States Attorney filed depositions of two Federal Bureau of Investigation Agents rebutting this claim [Tr. pp. 113, 121]. On November 17, 1950 [Tr. p. 151], Mr. Lavine asked a continuance in order to take the deposition of one of these Federal Bureau of Investigation Agents. Appellant had furnished Mr. Lavine some 60 questions to be propounded to this Agent, Mr. Furbush.

The deposition was taken and pursuant to stipulation of the parties was filed as testimony given at the hearing on said motion. The Court questioned counsel on whether appellant desired to appear at the hearing [Tr. p. 151] and entered a Minute Order [Tr. p. 151] directing him to obtain a statement in writing as to whether the appellant

wished to be brought into Court for a further hearing on this motion. Appellant replied [Tr. p. 152] that when he filed his motion he did not anticipate the appointment of counsel and that he was not well and did not wish to risk injury to his health by being removed to Los Angeles County Jail during the hearing. Further, by a letter dated December 7, 1950 [Tr. p. 152] he indicated that the records, documents and arguments were all before the Court and that there was nothing more to add. After a careful analysis and summation of appellant's claims Judge Weinberger determined that the appellant was entitled to no relief and denied the motions.

Appellant brought another Motion to Vacate Judgment in Case No. 19263, which was denied by Minute Order dated May 25, 1951.

On October 25, 1951, appellant filed this Petition for Writ of Habeas Corpus [Tr. p. 2] alleging an illegal imprisonment by Dr. Marion R. King, Superintendent of the California Department of Corrections, Medical Facility, Terminal Island, California. He acted *in propria persona.* On October 25, 1951, the Court granted him leave to appear *in forma pauperis.* On October 26, 1951, the Court, Judge Yankwich, appointed Henry P. Lopez as counsel for the petitioner and ordered the clerk to prepare an Order to Show Cause Why a Writ of Habeas Corpus should not issue. On October 29, 1951, the Order to Show Cause was issued [Tr. p. 22] directed to James J. Boyle, United States Marshal for the Southern District of California.

By Minute Order dated November 26, 1951 [Tr. p. 50] Judge Yankwich discharged the Order to Show Cause and denied the Petition for Writ of Habeas Corpus. Findings of Fact and Conclusions of Law [Tr. p. 56] and Order [Tr. p. 58] were signed December 3, 1951. The Court analyzed this case at length in his remarks from the bench on November 26, 1951 [R. T. Nov. 26, 1951, p. 7].

Thereafter appellant wrote Judge Yankwich [Tr. p. 61] and asked to have Mr. Lopez relieved as counsel and asked leave to file an appeal *in forma pauperis*. The Court granted this request [Tr. p. 63] by Minute Order dated December 26, 1951.

On January 30, 1952, appellant filed another Motion to Vacate and Set Aside Sentences in Cases Nos. 16167 and 19263. By Minute Order dated February 15, 1952, the Court ordered that the motion not be set until the appeal had been heard on the habeas corpus [this instant proceeding]. On February 21, 1952, the Minute Order of February 15, 1952, was corrected by a further Minute Order deleting the reference to Case No. 16167 in that Minute Order. The Court entered a further order denying Petitioner's motion to reconsider the Court's Minute Order of February 15, 1952.

Questions Presented.

As the multiple assignments of error set out by the appellant defy any attempt to extract individual questions for reply the assignments of error will be answered hereinbelow as well as possible in their chronological order.

ARGUMENT.

APPELLANT'S ASSIGNMENT OF ERROR NO. 1.

The Court Erred by Ignoring the Respondent Named in the Petition for the Writ: and, Instead Named the United States Marshal: and Erred in Accepting the "Return" From Said United States Marshal.

The appellant is claiming that the Order to Show Cause Why a Writ of Habeas Corpus Should Not Issue should have been directed to Dr. King, the Superintendent of the State of California Department of Corrections, Medical Facility, and not to the United States Marshal.

Under the provisions of Section 2241, Title 28, United States Code, a Writ could have been granted to the appellant only if

> "(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or * * *"

As the appellant makes no claim that the sentence rendered by the State Court was illegal, he must rely on one of the first two sections above. He contends that the state Medical Facility is holding him pursuant to the judg-

ments of the Federal Court. This argument is obviously fallacious as this Court can take notice of the fact that the State of California does not house federal prisoners except through its county and city jails while awaiting trial or upon special contract, not shown here. The appellant had already been sentenced by the State Court before the Federal Court rendered a sentence to run concurrently with the state sentence. The fact that his state sentence had not technically begun to run, due to a delayed commitment order, at the time the federal sentence was rendered, does not alter the fact that the federal sentence is tied to the state sentence to the extent that they shall run concurrently until one or the other runs out, at which time the longer of the two will continue to run until properly terminated.

Any argument that the Medical Facility was a federal institution because the federal government owned the land and buildings which it leased to the state, or that Dr. King became a federal employee or authorized representative of the Attorney General because of the concurrent sentences rendered in the federal court, are equally without merit.

As there was no federal officer to whom the Order to Show Cause could issue as being the custodian of the person of the appellant, and as the state judgments were not challenged, there was no one to whom the Order could issue except the United States Marshal. The Court obviously chose that means of formulating the issues so that the matter would be properly before it.

APPELLANT'S ASSIGNMENT OF ERROR NO. 2.

The Court Erred by Conducting the November 26, 1951 Proceedings on the "Return" to Its "Order to Show Cause" Under the Mistaken Belief It Had Issued the Writ, That the Petitioner Was Present and Also Was Represented by Counsel, and That It Was Holding a Hearing on the Merits of the Points Raised in the Petition.

While the Court misspoke himself, at first, in indicating that he had determined that the Writ should be discharged instead of denying the Writ, it is clear that he gave the appellant the benefit of the full hearing he would have had had the Writ actually been issued prior to the hearing. At no time was the Court *required* to issue the Writ.

An attorney, Mr. Lopez, was appointed by order of the Court dated October 26, 1951 [Tr. p. 26].

The Court was foreclosed from granting a Writ by the terms of Section 2255 of Title 28, United States Code, but still gave the appellant's attorney an opportunity to argue the matter. The fact that the Court leaned over backward to give the appellant every possible opportunity to be heard certainly should not be the basis for complaint at this point.

A Writ not having issued, there was no requirement that the appellant be physically present in Court when he had representation by counsel.

APPELLANT'S ASSIGNMENT OF ERROR NO. 3.

The Court Erred in Holding It Did Not Have Jurisdiction to Issue the Writ, Hear and Grant the Relief Prayed for; That the Petitioner Is Solely in State Custody; That "While Serving Said State Sentence" the Federal Judgments Challenged in the Petition Were Imposed on the Appellant.

The Court rightly held that it did not have jurisdiction to entertain the Writ.

Section 2255, Title 28, United States Code;

United States v. Hayman, 342 U. S. 205;

Fred Dwight Jones v. Squier (Warden), No. 13200, C. A. 9;

Willard A. Winhoven v. Swope (Warden), No. 12933, C. A. 9.

As pointed out under the discussion of Assignment of Error No. 1, the Court correctly determined that appellant was serving a state sentence and that he was in the physical custody of the State of California at the time of his Petition for Writ of Habeas Corpus. These points are more fully discussed under Assignment of Error No. 1.

It is immaterial whether the running of the federal sentences began before the running of the state sentence due to the delay in execution of a state commitment order. The fact is that the appellant was in a state prison under the authority of a state commitment order at the time that he made his Petition for Writ of Habeas Corpus. Those are the guiding jurisdictional facts in determining whether

or not the Writ will lie. The fact that the Court ordered the federal sentences to run concurrently with the state sentences did not make the appellant a federal prisoner as long as a portion of the state sentence remained and the appellant was in a state prison by virtue of prior acquisition of jurisdiction by the state.

APPELLANT'S ASSIGNMENT OF ERROR NO. 4.

The Court Erred in Deciding Against the Merits of the Charges Raised in the Petition, Because Its Factual Consideration of the Charges Was Limited to Material Obtained From the Proceedings: "Motion to Vacate No. 16167-Cr." and Said Proceedings as Held, Were Not a Legal Hearing.

Appellant argues that the pleas of guilty which he entered in the federal court were solely induced by the coercion and influence of an agent of the Federal Bureau of Investigation. The Court, at the hearing on the Motions to Vacate Judgments, had before it the affidavit of the appellant and the affidavits and depositions of the Federal Bureau of Investigation agents. The Court apparently chose to disbelieve this appellant, even under oath. As the record showed that the appellant was represented at all stages of the proceedings by his attorney and that the attorney intimated to the Court that he had discussed the question of a plea of guilty with the United States Attorney, there was every indication that the appellant had the advice of counsel at all times and acted in conformance therewith.

On the hearing of the Order to Show Cause Why Writ of Habeas Corpus Should Not Issue, the Court below merely adopted the findings and record of proceedings from the Motion to Vacate Judgments. As the appellant had no right to a hearing on a Writ of Habeas Corpus, he should hardly complain that the Court went to the trouble to further explain the action previously taken rather than to enter a denial of the Writ summarily.

The appellant now seeks through habeas corpus proceedings to review the Order Denying the Motion to Vacate Judgments. That has been clearly established by Section 2255 of Title 28, United States Code and by *United States v. Hayman,* 342 U. S. 205, as being by appeal from the Order and not by Writ of Habeas Corpus. No appeal was taken by this appellant and he cannot now be heard to complain of that proceeding.

It should be noted that the quotations given by the appellant on page 31 of his Opening Brief are not quotations at all. They are paraphrases of the record and are frequently inaccurate. The record itself tells an entirely different story.

The appellant again raises the question of arraignment. This has been discussed at length under Assignment of Error No. 5.

This Assignment of Error appears to be something of a catch-all for all the appellant's complaints. It is believed that all of the claims contained therein have been covered elsewhere in this brief.

APPELLANT'S ASSIGNMENT OF ERROR NO. 5.

The Court Erred in Not Discharging the Petitioner as to Judgment No. 19263-Cr., on "Point No. 2" as Set Out in the Petition for the Writ: When This Vital Charge Was Not Traversed by the Respondent, Was Not Controverted at the Hearing, and Was Not Found Against by the District Court.

In the first place, as hereinbefore stated, the Court had no authority to grant a Writ due to the limitations of Section 2255 of Title 28, United States Code and the decisions thereon in the United States Supreme Court and in this Court of Appeals.

Secondly, as there was no Writ, no Return or Traverse was called for. The government merely filed an Answer to Order to Show Cause with a supporting memorandum of authorities. The government did not thereby admit the truth of the appellant's allegations.

Thirdly, the allegations of the appellant are not true. As set forth in the statement of facts, there was in fact an arraignment. The Reporter's Transcript of the Proceedings of June 6, 1947, shows that appellant's counsel asked that the previously entered plea of not guilty be withdrawn [p. 3], the Court asked if there had been an arraignment and the Assistant United States Attorney replied in the affirmative [p. 4], and despite attempts by counsel for appellant and appellant himself to waive the reading of the indictment [p. 4], the indictment was read to him before the plea was accepted [p. 5].

There was in fact an arraignment. However, even had there been no formal arraignment, there would have been no fatal error. To be error, there must be a violation of a substantial right. A mere failure to meet all the formal

requirements of arraignment is not enough. (*Garland v. State of Washington,* 232 U. S. 642, 34 S. Ct. 456, 58 L. Ed. 772.) This rule has not been materially changed by the adoption of the Federal Rules of Criminal Procedure Rule 10. (*Merritt v. Hunter,* 170 F. 2d 739; *Mayes v. United States,* 177 F. 2d 505.)

APPELLANT'S ASSIGNMENT OF ERROR No. 6.

The Court Erred in Not Issuing the Writ When the Petition Was Good on Its Face Presented Sufficient Sworn to Facts and Authorities Which if Supported at a Hearing Would Have Justified Granting the Relief Prayed for.

As stated hereinbefore, the Court below was not only not bound to issue the Writ but was actually prevented from doing so by the terms of Section 2255 of Title 28, United States Code and the interpreting decisions previously cited. Motions to Vacate the Judgments had previously been denied.

The sworn statements of the appellant were obviously not "good on their face" when they directly controverted the reporter's transcript of the proceedings. Despite his denials, the record shows that the appellant was represented by counsel at all times.

The authorities cited by the appellant are not authority for the proposition that a Writ of Habeas Corpus will lie after Motions to Vacate Judgment have been denied, especially since Section 2255 of Title 28 has been enacted.

Conclusions.

Due to the multitudinous claims by the appellant, the appellee has attempted to answer as many of the contentions as possible. Actually, however, this case falls squarely within the provisions of Section 2255 of Title 28, United States Code, the *Hayman* case, and the *Fred Dwight Jones* and *Willard A. Winhoven* cases (decided by this Court and heretofore cited). As such, no Writ of Habeas Corpus could have issued to this appellant and all of his complaints as to the conduct of the hearing on the Order to Show Cause are irrelevant.

A reading of the transcripts of proceedings before both Judge Weinberger and Judge Yankwich reveals quite clearly that they acted with an abundance of caution in dealing with this appellant. They were evidently aware that they were dealing with a smart criminal who would seek to introduce error into the record. Both judges gave the appellant every safeguard, appointed counsel for him at each stage of the proceedings, rendered written opinions, and one made Findings of Fact and Conclusions of Law. They went to far more trouble than would ordinarily be customary in a case such as this. This brief and the pleadings in the Transcript of Record show that the appellant has acquired considerable knowledge of legal proceedings in his numerous sojourns in penal institutions and that he is not above distortion of the truth if it will serve his purposes.

It is respectfully submitted that the Order Denying Petition for Writ of Habeas Corpus, appealed from herein, should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

No. 13256

IN THE

United States

Court of Appeals

for the Ninth Circuit

WILEY JAMES WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

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STATEMENT OF JURISDICTION

The Appellant herein, Wiley James Williams, was indicted on February 16, 1951, by a grand jury in the United States District Court, District of Montana, Great Falls Division, charged with knowingly and wrongfully failing and refusing to perform a duty required under the Selective Service Act of 1948, and the rules and regulations issued pursuant to said Act, specifically a violation of Section 462 (a) 50 U.S.C., in that on December 14, 1950, he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States. He was duly arraigned and tried by the Court with a jury and convicted of the crime in the indictment and sentenced to imprisonment for one year and eight months. Notice of Appeal from the judgment of conviction and sentence was given on November 17, 1951, and the Appeal docketed and filed with the Court herein on February 14, 1952.

STATEMENT OF CASE

The Appellant is a registrant of Local Board No. 18, Selective Service System, Cut Bank, Glacier County, Montana. He is a member of Jehovah's Witnesses and requested conscientious objection form No. 150 which was completed and returned on November 1, 1948. On his questionnaire he also requested exemption as a Minister of Religion and a classification of IV-D. At his request he was granted a personal hearing on September 1, 1950. Appellant's file

with respect to said personal hearing makes no reference to the Local Board's action on Appellant's request for deferment as a conscientious objector to participation in war in any form, but does note "Registrant appeared before Board at regular meetings requesting re-classification to IV-D, request denied and registrant retained in classification I-A. Registrant informed this". (R. 18). He reported for his pre-induction physical examination at the Induction Center in Butte, Montana, was examined, and found acceptable. While at the Induction Center, the officer in charge inquired whether or not the Appellant was a married man. (R. 86). This officer advised him to report to the Local Board his married status. On October 3, 1950, he reported to the Clerk of the Local Draft Board, personally and in writing, that he was married on July 13, 1950, to Matilda Arellana at Yakima, Washington. (R. 20, 88). The Draft Board Clerk then advised him that he "would be reconsidered and given a different classification." (R. 89). Appellant instead of taking an appeal to the Appeal Board expected and awaited the change of classification promised, but the Draft Board did not change his classification and Appellant was thereby prevented from taking his appeal. Important to the determination of this Appeal too is the fact that according to the testimony of the Chairman of the Draft Board, the Appellant was granted a classification as a conscientious objector and the Chairman testified that the registrant was entitled to such classification but

that Appellant insisted on IV-D classification. (R. 70, 71).

During the course of the trial, Appellant made a motion to dismiss the indictment on the grounds that the evidence produced by the Appellee was not sufficient to sustain the charge in the indictment (R. 37, 38, 39, 40, 41, 42, 43, 44) and also entered his exception to the Court's instruction to the jury that the indictment was sufficient. (R. 122). In addition, the Appellant attempted to introduce evidence and made appropriate offers of proof to show that the Local Board had failed to accord the Appellant a full, fair and impartial hearing on his classification (R. 64, 65, 66), and failed to take evidence of any kind in connection with Appellant's request, duly filed, for deferment as a conscientious objector, and refused to hear a witness produced by Appellant on such claim. (R. 67, 68). The evidence and offers of proof were refused admission by the lower court. It is also most essential to point out that the Government itself, the Appellee here, on its own initiative, opened up the question of the Board's consideration of the Appellant's classification at his personal hearing and asked specifically the Chairman of the Board if "the Board had considered everything in the Appellant's file at the time of said hearing," and the reply was in the affirmative. (R. 69). On Appellant's examination of this witness, the Court first permitted some examination as to matters in the file then closed Appellant's right to examine and in his instructions

advised the jury to ignore all of this evidence (R. 121) to which Appellant duly excepted. (R. 123).

QUESTIONS INVOLVED

Although Appellant cites twenty-seven Specifications of Error, the questions involved here can be simply and briefly stated:

1. Did the Court err in denying Appellant's Motion to Dismiss the Indictment on the grounds that the evidence produced by the Government, Appellee herein, was insufficient to sustain the charge contained in the indictment when such evidence showed only that Appellant had failed to report to his local Board for induction, but was charged in the indictment with violation of the Act "in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States" his induction and service being contingent upon his passage of certain examinations at the Induction Center and his acceptance by the Armed Forces?

2. Can the Appellant, in defense to a prosecution for a violation of the Selective Service Act, his right to appeal his classification having been prevented by the action of the Clerk of the Local Board, imputative to the Board itself, raise the questions of a denial of a full, fair and impartial hearing on his classification, the failure of the local Board to take any evidence on his claim for deferment as a conscientious objector and refusing to hear a witness produced by him as to his claim?

3. Can the Appellant, his right to appeal having been prevented by action of the local Board, raise, in defense to a prosecution for a violation of the Act, the question of bias and prejudice of the local Board against the Appellant because of his religion in a hearing on classification?

4. The Government, having previously in its own examination and on its own initiative, opened up questions considered by the Board in classification of the Appellant, did the Court err in refusing to permit Appellant to raise the question of the manner in which the local Board rejected Appellant's request for classification as IV-D as a regular Minister of Religion, and in refusing to permit Appellant to develop fully the manner in which the Board denied Appellant's claim for deferment as a conscientious objector?

5. Did the Court err in commenting in the presence of the jury that Appellant had nothing left in his case but question of intent, when the Appellee itself had actually opened up matters considered by the Board at the hearing on Appellant's classification and Appellant had produced evidence which was admitted by the Court and uncontroverted by the Government, that he had been prevented from taking his appeal by advice and action of the Draft Board Clerk, which was imputative to the Board itself?

6. Did the Court err in instructing counsel for the Appellant that in his argument to the jury counsel must confine his closing argument solely to the ques-

tion of intent and must not refer to any other matters produced at the trial when such matters had been introduced into evidence by the Appellee itself and the Appellant, and the Court had permitted its introduction during the course of trial when there was uncontroverted evidence that the Appellant had been prevented from taking his appeal by action imputative to the local Board, and when there was evidence that the Board had actually granted Appellant's claim for classification as a conscientious objector?

7. Did the Court err in instructing counsel for the Appellant that he could not discuss the elements of the indictment which had to be proved to sustain a verdict of guilty, or whether the Government had proved the crime charged in the indictment?

8. Did the Court err in instructing the jury that the Appellant was required to submit to induction to obtain judicial determination of the Board's orders and then only on Writ of Habeus Corpus after induction?

9. Did the Court err in his instructions to the jury in reading the entire criminal section of the Act, including all offenses which were defined as crimes under the Act, and stating that the entire statute applied to the case at bar, which tended to confusion and speculation on the part of the jury and constituted prejudicial error to the Appellant?

10. Did the Court err in instructing the jury that the Appellant was precluded by his failure to appeal his classification from raising the question of the validity

of the Board's order of induction when there was uncontroverted evidence properly introduced and admitted that he was prevented from taking such appeal by action imputative to the Board itself?

11. Did the Court err in instructing the jury to ignore all the evidence with reference to the administrative features of the case, particularly the classification of the Appellant and the hearing held by the Board, when the Government itself, on its own initiative, had opened up these questions, and they had actually been introduced into evidence, and when other evidence on these features went to the question of criminal intent and also to the prevention, by action imputative to the Board, of Appellant's appeal of his classification?

12. Did the Court err in denying effective and effectual aid of counsel to the Appellant by compelling Appellant and his counsel to go to trial when there was uncontroverted showing of physical inability on the part of counsel to properly prepare for trial and properly and effectively defend Appellant and did the Court not demonstrate throughout the trial a bias and prejudice against the Appellant in an assidious effort to obtain a conviction of the Appellant?

Finally, did the evidence adduced by the Government support the verdict of the jury and his conviction under the charge stated in the indictment?

SPECIFICATIONS OF ERRORS—STATEMENT OF POINTS

The Appellant adopts as his Specifications of Error the Statement of Points heretofore submitted to this Court on Appeal, and from the Judgment of Conviction and Sentence in the Court below, Appellant appeals and specifies as error that the trial Court erred as follows:

1. In denying effective and effectual aid of counsel to Defendant (Appellant herein) in violation of the due process clause of the V and XIV Amendments to the Federal Constitution, by compelling Defendant to go to trial at a date when his counsel's physical condition was such that he could not properly prepare case, and provide effective and effectual counsel;

2. In refusing to permit the introduction of evidence of marriage of the Defendant, at a time when local board was not inducting married men, when board had been properly notified of said marriage in writing prior to report for induction order, and board had ignored such information and fact, which said evidence was as follows (R. 20-30, incl.):

CROSS-EXAMINATION

By Mr. O'Connell:

Q. Mrs. Welch, I show you a form which is contained in the file which is offered here in evidence by the government and I ask you to tell the jury what it is?

A. It is just a statement made —

The Court: What is it?

A. It is a statement made by Wiley Williams saying, "I was married July 13, 1950, to Matilda Arellana at Yakima, Wash." Dated October 3, 1950.

Q. (By Mr. O'Connell): And I think you testified that he was ordered to report for induction on December 14, 1950, isn't that correct?

A. Yes, it is.

Q. Were you clerk of the draft board at Cut Bank on October 3, 1950?

A. I was not.

Q. You were not the clerk? A. No.

Q. So you would not be able to testify with reference to this particular part of the record as to any of the situation that existed at that time?

A. No, I will not.

Q. Would you be able to testify from this record which has been submitted in evidence what was done with Mr. William's notification to the board that he was married on July 13, 1950? A. No.

Q. Is there anything in the record which shows what the board did about his notification to the draft board that he was a married man?

Mr. Angland: Just a minute. Unless counsel has some basis in law for requiring the board to take some action in response to that notice there is none as required by the board.

Mr. O'Connell: Your Honor, under classification procedures I am sure the court is acquainted with the regulation which says no classification is permanent. The regulation of the Selective Service laws re-

quires a registrant to report to the board any change in his occupational or marital status, which Mr. Williams did report it to the board that he was a married man, that he was married, and the regulation goes on to say that this must be taken into consideration in view of the fact that married men at the time Mr. Williams was ordered in for induction weren't being inducted into the Army.

Mr. Angland: Well, where is that regulation? Let's see that regulation.

Mr. O'Connell: It is part 1625, reopening and considering registrants classification issued August 20, 1948, by Executive Board 9988, 13 Federal Register 4815. Section 1625.1 Classification not permanent. (a) No classification is permanent. (b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, or dependency status, or in his physical condition. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact. (c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps

may be taken by the local board to keep currently informed concerning the status of classified registrants."

Mr. Angland: My objection is renewed, your Honor. If I might be heard for just a moment. I don't find anything in that regulation. The Act itself without necessity of a regulation requires all registrants to keep the board informed. Section 15 of the Act, I believe it is. "It shall be the duty of every registrant to keep his local board informed as to his current address and changes in status as required by such rules and regulations as may be prescribed by the President." And the registrant did comply with that regulation, he advised the board.

The Court: Well, what difference does that make so far as the classification is concerned?

Mr. Angland: It doesn't make any as far as I can see.

The Court: The fact he notified the board he had been married, what has that got to do with it?

Mr. Angland: There isn't anything. It isn't even a request for classification, although I question whether the board would have to consider it a request.

The Court: No certificate he was married; just a note to the effect he was married at such and such a place in the State of Washington.

Mr. Angland: That is all it amounts to. The statement I believe is in the file; it is part of the original file.

The Court: I don't see how that has any application or makes any difference at all.

Mr. Angland: I don't think it does.

The Court: On classification by the board. There must be different and something more than that in the classification.

Mr. O'Connell: Your Honor, this regulation specifically says the classification is not permanent.

The Court: Of course, it is not permanent; I know that as well as you do.

Mr. O'Connell: And the registrant shall report and he reported the change.

The Court: It all depends on how the classification was conducted and what it shows and what is found.

Mr. O'Connell: I will ask the witness then, your Honor, if the board took any action with reference, if your records show if the board took any action with reference to Mr. Williams' notification to the board that he was a married man?

A. Well, no, the statement speaks for itself. It is in the record in the file. It is filed.

Mr. O'Connell: I submit, your Honor, under due process the board cannot just ignore, they can't just fail to do nothing about a change in the status.

The Court: Suppose it made no difference with the law; suppose they had a right to induct him whether married or not; then what have you to say?

Mr. O'Connell: If the regulations permitted, if the regulations at that time and the policies of the Selec-

tive Service were to induct married men, then, of course, it has no regulation.

The Court: The policy has nothing to do with it. What was the regulation? Is there any difference in the statute? Was there any reason why he shouldn't be inducted whether married or unmarried? Mr. O'Connell: The regulations provision is mandatory for deferment of married men.

Mr. Angland: Well, where it that?

The Court: Yes.

Mr. Angland: If there is such a regulation, your Honor, the board would have to take action and if there isn't, they wouldn't. I know of no such regulation.

Mr. O'Connell: Your Honor, we had a case, I wired to the Clerk of the District Court at San Diego for a case handed down in the Southern District of California involving just exactly this same point and where the Judge ruled that the board could not induct married men when the policy of the Selective Service System was not to induct them, and the court there so ruled, but the Clerk of Court did not send me the opinion. I hope I can get it before the case is concluded but if the court will bear with me, I will find the regulation which provides for the deferment of men who have a wife or children.

Mr. Angland: Your Honor, a regulation that permits is one thing. If there is a mandatory regulation that required the board, on being advised this boy was married that requires them to defer him, then we

have something; I think otherwise we are wasting the time of the court and the jury.

The Court: Yes, a regulation would be the law. If that was the law at that time and the board failed to consider it, why then there is a question. Then there is also a question whether or not he shouldn't present some substantial evidence of that fact.

Mr. Angland: I think that is absolutely right.

The Court: Following his notification. Not simply saying, I was married. Anybody could say that, and what would that amount to as evidence for the board to consider?

Mr. O'Connell: Your Honor, regulation 1622.15: "Class III-A: Registrants with dependents. (a) In Class III-A shall be placed (1) a registrant who has a wife or child with whom he maintains a bona fide family relationship in their home."

Mr. Angland: Your Honor, it is completely ridiculous to submit that to the court. This sets up what persons shall be classified or what classifications there there are and what persons shall be put in those categories. Here is a boy who has been classified in 1-A. Now then it is a question as to whether or not the board must reopen the classification upon receipt of that letter. Now there are sections that say when the registrant's classification may be reopened and considered anew, and I have that regulation before me. There is another regulation that says when the registrant's classification shall be reopened and considered anew, and that situation presented now does not come

within either of those categories. These sections 1652.2 and 1625.3 follow the very section Mr. O'Connell read to the court a few moments ago. Of course, the mere mentioning of the classification as he has done to the court, saying in class I you shall have this group, and in class 3 if you determine this fellow ought to be determined in this class, this is the class he ought to go in and falls in that category. That is what he read to tell where these persons are placed; it is quite a different situation than he has presented to the court.

Mr. O'Connell: Your Honor, the board just can't ignore the facts; it just can't deny completely the registrant to due process when he made a showing that he was married; whether it was complete or full enough or not, at least he informed the board of his martial status, and the board when it decides whether or not it renews or reopens a classification can't just ignore the facts. They can't just say, we don't know whether he is married or not. The board must give him a fair hearing; and if it doesn't have jurisdiction to issue an order to him.

The Court: I will not hear your argument now and I will defer ruling on this until I give the Government an opportunity to go into it. You have sprung something they haven't had a chance to investigate.

Mr. Angland: It is very clear, your Honor, and I can read the regulation, and I think it is so clear it won't take a moment.

The Court: Read it so we can all hear.

Mr. Angland: "Section 1625.2. When Registrant's Classification May Be Reopened and Considered Anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant"—

Mr. Angland: Now that doesn't exist.

Mr. Angland: "The government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Mr. Angland: Now I find nothing in that, and that is not a mandatory section, that is a permissive section; they may reopen on certain demands, your

Honor. The defendant in this case doesn't fall into any of those categories.

The Court: That is right. What have you to say about that?

Mr. O'Connell: I want to submit to the court an additional regulation. "1625.4 Refusal to Reopen and Consider Anew Registrant's Classification. When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request——"

The Court: Well how does that change the regulation which has been just read; there must be a request and there must be something done, some overt action on the part of the petitioner.

Mr. O'Connell: Your Honor, when the registrant here notified the board that he was married, although

he doesn't go into the technical language of saying I want the board——

The Court: He didn't comply with the regulation.

Mr. O'Connell: He did submit the change in his status, your Honor, in a written piece of paper to the board.

The Court: I will overrule your objection, Mr. O'Connell. We will go to something else.

Mr. O'Connell: Under the rules I don't think I have to save my exception, do I?

The Court: No. You can if you want to. I will stand on the regulation as read by the Assistant United States Attorney. Some further action must be taken on the part of the registrant. Proceed with some other feature of the case, Mr. O'Connell.

3. In overruling or denying, at end of Government's case, Defendant's motion to dismiss the indictment on the ground that the Government (plaintiff) had failed to prove the crime charged in the indictment;

4. In refusing the admission of evidence of Defendant's marriage for the purpose of showing a lack of criminal intent, and in sustaining the Government's objection to Defendant's offer of proof thereon (R. 58, 59, 60, 61, 62) which said evidence was as follows:

Mr. O'Connell: Your Honor, there is a decision by Judge Yankwich in Ex Parte Stewart in 42 Fed. Supp. which says that because of the provisions of the indictment saying that the defendant knowingly

and wilfully failed and refused, that evidence of why he did not report can be given.

The Court: Yes, we haven't any time to go hunting up some decision that is sprung on the spur of the moment on whether it would have any application here or not. "Knowingly and wilfully failed to perform a duty required of him under the Selective Service Act of 1948, and the Rules and Regulations issued pursuant to said act in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States." Now, what have you got on that to show lack of criminal intent there? How is that question and answer to it going to have any bearing upon the question of intent?

Mr. O'Connell: Because, your Honor, it will show why the defendant thought he didn't have to report for induction.

The Court: Well, let's hear what the witness has to say about it.

A. Well, he told me he didn't have to report because he was married.

The Court: I don't know what she said. I couldn't hear it.

A. He said he didn't have to report because he was married.

Q. Did he tell you about any discussion with Shirley Proefrock, who was the clerk of the draft board, in this connection?

A. Yes, she said he was to get III-A classification.

Mr. Carmichael: There was no question asked.

The Court: That is hearsay, almost double hearsay.

Q. What did the defendant tell you what his intent was in not reporting for induction?

A. Well, since he was married he didn't have to report.

The Court: You have already brought that out once.

Q. When and where were you and the defendant married?

A. We were married July 18, 1950, in Yakima, Washington.

Q. Had you been engaged for some time before that? A. Yes.

Q. When did you meet the defendant?

A. June, 1949.

Q. June, 1949, do you remember when you became engaged? A. No, I don't.

Q. It was sometime was it prior to July 18, 1950?

A. Yes.

Q. You don't know approximately when?

A. No, I don't.

Q. Was it in October of 1950, or of 1949, rather?

A. Some place like that, September or October.

Mr. O'Connell: Your Honor, because there was a question this morning about the record of whether or not the defendant was actually married and the lack of record in order to protect the record I would first like to mark this for identification.

Q. I show you Defendant's Exhibit No. 2 and will you tell the court and the jury what this is?

A. I don't understand.

Q. Just tell the court and the jury what this document is?

Mr. Angland: Just a minute. I will object to that question, your Honor. It is improper to ask about the document. He can ask if she knows what it is and then submit and offer it in evidence and the jury can tell what it is after it is admitted in evidence.

Q. Do you know what this document is?

A. Yes, it is a certificate of our marriage.

Q. Do you know whether or not it is genuine?

A. Yes, I know it is.

Q. Do you know who gave it to you?

A. Yes.

Q. Who gave it to you?

A. The Judge that married us, the Justice of the Peace.

Q. That married you? A. Yes.

Mr. O'Connell: We offer it in evidence, your Honor.

Mr. Angland: To which we object, your Honor. The proper place to be offered the evidence was to the Selective Service Board and not to this court; that is not now being made part of the Selective Service file for consideration by the board; the board is the one that considers the classification. It is objected to as not tending to prove or disprove any issue in this case.

The Court: No step was taken toward the assertion of any such a claim as that, no hearing was ever made——

Mr. O'Connell: Your Honor, I would like to make an offer of proof in connection with the document.

The Court: Very Well.

(The offer of proof and objection were made in the record away from the hearing of the jury).

Mr. O'Connell: The defendant offers to prove by Defendant's Exhibit No. 2 entered for identification already and objected to by counsel for the Government that the defendant, Wiley James Williams, and the witness, Matilda Williams, through whom this evidence was offered were officially and legally married on the 18th day of July, 1950, at Yakima, Washington, prior to the order to report for induction issued by Local Board No. 18, Glacier County, Montana, Selective Service System.

Mr. Angland: You don't want my objection dictated at this time, your Honor?

The Court: You might as well. You didn't make it full and complete before, just general.

Mr. Angland: It is objected to as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in the case. This is an **attempt serve** or furnish a basis for a different classification than that fixed by the Selective Service Board and not properly a matter to be considered by the court or jury in this case, and an attempt to substitute the judgment of the court and jury here for the judg-

ment of the Selective Servic eBoard that classified the defendant in this case.

The Court: I will sustain the objection. I think I already ruled on it.

5. In fuling and in further instructing jury that no evidence was ever submitted to local board on Defendant's married status (R. 62), which said ruling was as follows:

Mr. Angland: Your Honor, we might ask the jury to disregard any reference to the marriage since the testimony did go in.

The Court: The jury will pay no attention to that evidence which has been offered here because as you recall heretofore this morning it was clearly shown that no evidence was ever made before the local board or any hearing to present any hearing on the marital status at all. That is all.

Mr. O'Connell: Your Honor, the record does show the record that was introduced by the Government itself.

The Court: You heard what I said to the jury and that goes. No hearing or proof was ever offered.

6. In refusing to permit the introduction of evidence by the Defendant of Board's failure to accord Defendant a full, fair, and impartial hearing on his classification, as affecting Board's jurisdiction to issue valid order to report for induction (R. 64), which said evidence was as follows:

Q. You were there the night he had his hearing?

A. Yes.

Q. Now I want to ask you if in your opinion if the defendant had a full, fair and impartial hearing?

Mr. Angland: Just a minute. Your Honor, I am going to object to that. I don't know why we should resist it; I assume the answer will be favorable, but I don't believe that the judgment of one member of the board as to what kind of a hearing it was is proper evidence before this court.

The Court: Or going into the subject for the jury to hear or pass upon anyway.

Mr. Angland: No. It is improper for consideration of the jury.

The Court: I will sustain the objection to it.

Mr. O'Connell: I want to ask another question and then make an offer of proof.

7. In sustaining Government's objection to offer of proof through the witness Schuette that Defendant had been denied a full, and impartial hearing by the board on his classification (R. 65, 66), which said offer was as follows:

Mr. O'Connell: Now, your Honor, I want to make an offer of proof.

The Court: All right.

(The offer of proof and objection were made away from the hearing of the jury).

Mr. O'Connell: By the witness, Phillip Schuette, the defendant offers to prove that the witness would testify that the defendant, Wiley James Williams, did not have a full, fair or impartial hearing before the local Selective Service Board on his classifica-

tion. That sometime following and before the order to report for induction issued by the said local board Phillip Schuette, the witness, Phillip Schuette, and the defendant, Wiley James Williams, sat in a car outside the Pay and Pack It grocery store located in Cut Bank, Montana, and the witness, Schuette, informed the defendant, Williams, that he did not have a full, fair and impartial hearing on his classification as made by the local Selective Service Board; that the said witness, Phillip Schuette, made these statements to defendant while a member of the local Draft Board No. 18, Glacier County, Montana, which had jurisdiction over the defendant, Wiley James Williams.

Mr. Angland: That is objected to as wholly incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in the case; and it is an attempt to obtain a review of the classification of this defendant by this court and jury while the record before the court shows that the defendant did not exhaust his administrative remedies or take any affirmative action to obtain a new hearing, a more complete hearing or a hearing upon appeal.

Mr. O'Connell: That is all, Mr. Schuette.

Mr. Angland: I don't believe the court ruled upon our objection to the offer of proof.

The Court: I sustain the objection.

8. In refusing admission of evidence as to whether or not Board had considered request of Defendant

for deferment as conscientious objector (R. 67), which said evidence was as follows:

Q. What evidence was taken on whether or not he was a conscientious objector?

Mr. Angland: Now, just a minute. To that we want to object, your Honor, as attempting to try this matter before this court and jury. The record in this case shows that the defendant did not exhaust his administrative remedy; the place for review of the decision of the board was on appeal and such evidence at this time is incompetent, irrelevant and immaterial in this case.

The Court: Sustain the objection.

9. In sustaining the Government's objection to Defendant's offer of proof, through the Witness Sammons that no evidence of any kind had been taken by the local board in connection with the Defendant's proper request duly filed for deferment as a conscientious objector, and refused to hear a witness produced by Defendant as to his claim for such deferment (R. 68), which said offer was as follows:

Mr. O'Connell: Now, your Honor, I would like to make another offer of proof.

(The offer of proof and objection were made in the record away from the hearing of the jury).

Mr. O'Connell: By the witness, Duane Williams, the defendant offers to prove that no evidence of any kind was received by Local Board No. 18, of Glacier County, Montana, of the Selective Service System, in connection with and in reference to the

form which the defendant had duly filed asking for a classification as a conscientious objector opposed to both combat and noncombat duty in the military service; that by the witness, Duane Sammons, the defendant offers to prove that said board refused to hear a witness produced by the defendant, one David Broadhead, of Cut Bank, Montana, as to the conscientious objections of the defendant based on religious training and belief and not on any political, philosophical or social views of the defendant.

Mr. Angland: The same objection made to the last offer of proof.

10. In commenting and ruling in the presence of the jury that Defendant didn't make any claim to deferment as conscientious objector, in face of uncontroverted evidence to the contrary, and then commenting and ruling after objection by Defendant's counsel that Defendant had practically abandoned his claim for such deferment (R. 74, 75, 76), which said comment and ruling were as follows:

Q. Now in the record in Plaintiff's Exhibit No. 1 is there any place where the record shows that the defendant, Wiley James Williams, withdrew that claim for conscientious objector?

A. I haven't been through it to that extent. Now I just couldn't put my finger on it but he probably—you asked if we considered these things which he claimed. The board considered it. He asked us outright for 4-D; that is what he asked us for, but we couldn't grant that.

Q. But you determined he was entitled to 1-AO?

A. Yes.

Mr. O'Connell: That is all.

Q. (By the Court): Now I understand you to say a few minutes ago that he said he didn't want that?

A. He wouldn't take 1-AO so he had no choice.

A. That is right.

Q. In other words, he abandoned that claim?

A. He wouldn't take it so we had to put him back in 1-A. We had no other choice.

The Court: I understand that was your testimony in the first place he wouldn't accept it.

Q. (By Mr. O'Connell): Did he tell you that he abandoned it?

A. I don't know what you mean.

Q. Did he tell you that he didn't want it?

A. The understanding given I said he would not accept 1-AO.

Q. He would not accept 1-AO bue he actually told you he would prefer 4-D in the minister classification? A. He said he would accept.

The Court: Oh, he didn't say that.

Q. (By Mr. O'Connell): But he told you he wanted, if he could get it, the 4-D classification?

The Court: Now let's finish this examination and quit trying to test the witness' examination in that respect. We understand what he said about it. What he did say was practical abandonment of his objection as an objector, conscientious objector.

Mr. O'Connell: The record in Plaintiff's Exhibit

No. 1 nowheres, your Honor, shows that he withdrew his claim for conscientious objector.

11. In refusing to permit Defendant to develop fully question raised as to Defendant's claim for deferment as conscientious objector, the Government having previously opened up question on its examination and initiative, (R. 76, 77), which said ruling was as follows:

Mr. O'Connell: But I ask you to look at the record, part of the record in Plaintiff's Exhibit No. 1 with reference to what the Government has just raised the entry under December 1st, 1950, and tell me whether there is rejection in there of the conscientious objector claim?

A. Well it was verbal in the meeting and we couldn't give him what he asked for.

Q. I asked you with reference to the entry Government's counsel claimed that there was rejection in the record of the conscientious objector claim, and I read from this the entry of September 1st, 1950, and I ask you to tell me whether under entry of September 1st, 1950, there is rejection of claim for conscientious objector?

A. This is what took place. He didn't want 1-AO.

Q. Does that say that there?

Mr. Angland: Now just a minute. Your Honor, perhaps we have gone a little too far now.

The Court: I think so.

Mr. Angland: Your Honor, I will object to questions put to this witness to interpret the words that

happen to be used for the entry of the minute action taken by the board as recorded. The action is recorded and this witness has testified what the claim was at that time.

The Court: Now, Gentlemen, I am going to conclude this right now. We don't want any more questions propounded to this witness on that subject. This is all the repetition any of us can stand. You can go to something else.

Mr. O'Connell: I want to save an exception to the ruling of the court on that matter.

12. In refusing to admit evidence of the bias and prejudice of the local board against Defendant because of his religion, in hearing on classification, as affecting Board's jurisdiction to issue valid order of induction (R. 79, 80), which said evidence was as follows:

Q. When you considered, Mr. Sammons, the file which was before you, the record which was before you on this classification, did you take into consideration the defendant's religion?

Mr. Angland: Now just a minute. Your Honor, this is again an attempt to go into the trial of the issues considered by the board and not properly before the court at any time.

The Court: Sustain the objection.

Mr. O'Connell: Your Honor, I would like to be heard. Now the Government opened up the question of consideration of this classification, Government's counsel himself presented the record, presented the

record that was there and asked him if these were the things that went before the board. He actually opened up the question himself. The Government's counsel himself opened up the whole matter, he even said he maybe went a little further than he should. He opened up this whole question and because he opened it up I think I have a right to ask a witness whether this man's religious was considered, which is part of the record in here which shows his religion. The Government made the mistake by making, opening up this first, your Honor. The Government counsel opened up that first and asked them what they had under consideration.

The Court: Yes, that is right, he did.

Mr. Angland: Quite right, your Honor, because of a very cautiously worded offer of proof. In order to keep the record straight in this case we did to that extent.

The Court: I will let him answer that question as long as we have gone this far and I will cover the whole proposition when it comes to instructions to the jury.

The Witness: Would you restate the question?

Q. (Question read): When you considered, Mr. Sammons, the file which was before you, the record which was before you on this classification, did you take into consideration the defendant's religion?

A. Do you mean by that that we might be biased?

Q. I am not asking that. I am asking whether you took it into consideration, and after you answer

me whether you did or not, yes or no, then I will propound another question.

A. It is pretty hard to answer it yes or no.

Q. Well whatever way you can.

A. We have held no man's religion against him in their group.

Q. You wouldn't hold the defendant's religion against him?

A. We were trying to be as unbiased as possible.

Q. Do you remember a statement that Mr. Daley made about Mr. Williams at the beginning of the hearing?

Mr. Angland: Now just a minute. Your Honor, this is going away beyond this file we opened up. This is attempting to retry the matter that was heard at the special hearing held by this board and it is not proper to rehear it now before the court at this time.

The Court: I will sustain the objection.

Q. On the basis of the record which was before you, which you had on your consideration, on what grounds did you deny the defendant's request for 4-D classification as a minister of religion?

Mr. Angland: That is objected to as repetitious, your Honor, and it is improper examination.

The Court: No, we shouldn't have gone as far as we have.

Mr. O'Connell: That isn't my fault, your Honor.

The Court: I will sustain the objection. You know, of course, I will have to instruct the jury on

this course of examination that has been going on here.

Mr. O'Connell: But the Government opened up this question, your Honor.

The Court: That is all right, no matter whether they did or not we know what the law is on the subject.

Mr. O'Connell: Yes, but when the Government opens that question itself I have the right to examine the witness.

The Court: I will close it now.

13. In refusing to admit evidence of matters considered in Board's rejection of Defendant's request for classification of IV-D, as a regular minister of religion, when Government in its own examination, and on own initiatives had opened up questions considered by board in classification of Defendant prior thereto (R. 79, 80), which said evidence was as follows:

Q. On the basis of the record which was before you, which you had on your consideration, on what grounds did you deny the defendant's request for 4-D classification as a minister of religion?

Mr. Angland: This is objected to as repetitious, your Honor, and it is improper examination.

The Court: No, we shouldn't have gone as far as we have.

Mr. O'Connell: That isn't my fault, your Honor.

The Court: I will sustain the objection. You know, of course, I will have to instruct the jury on this

course of examination that has been going on here.

14. In commenting, in presence of jury, before Defendant had rested his case, that Defendant had nothing left in case but question of intent, after Government on own initiative had opened up question matters considered on Board's classification of Defendant, and Defendant had produced evidence duly admitted into the record that he had been prevented from taking appeal by advice and action of draft board clerk, imputative to Board itself (R. 87), which said comment was as follows:

The Court: Well he had a right of appeal and he didn't take it.

Mr. O'Connell: He can make a showing, your Honor, that he was prevented.

The Court: If he can make a showing of intent or some showing on the question of intent, that is about all you have got left in the case.

Mr. O'Connell: He can make a showing, if he can, that the draft board prevented him by its action from taking that appeal.

The Court: Why didn't you go into that while you had the officer on the stand if the draft board did anything in an arbitrary way to prevent him from taking an appeal?

Mr. O'Connell: Because neither Mr. Sammons nor Schuette could testify to the occurence or incident that went on that I wanted to bring out.

15. Appellant abandons Specification of Error No. 15.

16. In instructing Counsel for the Defendant that his closing argument to the jury must not refer to administrative features of the case, and actions and orders of the board, particularly when those matters had been introduced into evidence by the Government itself, and the Court had permitted evidence of this nature to be produced and introduced during the course of the trial (R. 102), which said instruction was as follows:

The Court: Very narrow, and I want to tell both of you gentlemen to begin with that I am eliminating everything in regard to the administrative features of the case and the actions and orders of the board, everything in reference to it, and I shall read an instruction that will cover that proposition precisely so I don't want any reference made to it in your arguments because it is all going to be eliminated from the jury.

Mr. O'Connell: If the court please, I—if I understand correctly that of course does not prevent counsel from discussing what the testimony of the witnesses was which was to go into the record.

The Court: No, it was injected in the record as sometimes occurs when an opening occurs before a jury in the trial of a case and over-zealous counsel inject things in there that shouldn't be there, but the court is going to take it out.

17. In instructing and ruling that Counsel for the Defendant must confine his closing argument to the jury solely to the question of intent, when other mat-

ters were properly in evidence, duly admitted by the Court, and Government had on its own initiative raised questions of matters considered by the board in its hearing on Defendant's classification (R. 102), which said comment and ruling were as follows:

Mr. O'Connell: But in our argument to the jury all of this evidence is in the case.

The Court: But it will not stay in the case after you hear my instructions. About all you have got left in your case is the question of intent, and that is all I want to hear about. Now you may proceed for the Government.

18. In instructing Counsel for the Defendant, and ruling so, that in his closing argument to the jury he could not discuss the elements of the indictment, which had to be proved to sustain a verdict of guilty (R. 102, 103), which said instruction and ruling were as follows:

Mr. O'Connell: Your Honor, is argument out about the indictment?

The Court: Why yes.

Mr. O'Connell: The essentials on proving the elements of the indictment?

The Court: Certainly, but you can't do anything about this administrative feature; that is eliminated from the case.

19. In ruling that the Defendant was not to argue to the jury whether the Government had proved the crime charged in the indictment (R. 102,103), which said ruling was as follows:

Same colloquy as appears in Specification No. 18.

20. In ruling, that in an instruction to the jury, the Court should instruct that the indictment would be held good (R. 105, 106), which said instruction was as follows:

Mr. O'Connell: His duty under this was to report to his local board, and if he violated anything it was this order to report to his local board for transportation to Butte and that is what he should have been charged with in the indictment and that is the crime with which he should have been charged with.

Mr. Angland: Just a minute. That is the crime with which he is charged and the court has passed upon that.

The Court: My instructions will cover that feature of it. That indictment will be held good.

21. In reading in his instructions to the jury the entire criminal section of the Selective Service Act of 1948, including all the offenses which could be committed and were defined as crimes under the act, and stating that the indictment was properly based upon this section, and that the entire statute applied to the case at bar, tending to confuse and speculation on the part of the jury and constituting a gross prejudicial error to the Defendant (R. 107, 108, 109), which said instruction was as follows:

Now the law on which that indictment is based I am going to read to you. It is rather lengthly and some of it would apply under different state of facts perhaps but you will find that it also applies here in

this case, and that this indictment is properly based upon this Section.

Section 462. Offenses and penalties: "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections referred to), rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (under said section), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of

him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (under said sections). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing."

22. In instructing the jury that the Defendant was required to submit to induction to obtain judicial determination of the Board's orders; that indictment for failure to obey these rules precludes Defendant from raising these issues, particularly when the Gov-

ernment on its own had raised these issues in the course of the trial (R. 120) , which said instruction was as follows:

It appears that under Sec. 10(a) (2) of the Selective Service Act, rightly construed, the registrant, on pain of criminal penalties, to obey the local board's order to report for induction into the armed forces, even though the board's order or the action of the appeal board on which it is based is erroneous. In order to obtain a judicial determination of such issues, such registrant must first submit to induction and raise the issue by habeas corpus.

It follows that if the registrant is indicted for disobedience of the board's order he can not defend on the ground that the draft procedure has not been complied with or, if convicted, secure his release on that ground by resort to habeas corpus.

23. In instructing the jury that the Defendant was precluded by his failure to appeal his classification from raising the question of the validity of the Board's order, when there was uncontroverted evidence, properly introduced and admitted, that he was prevented from taking such appeal by the action of the Clerk o fthe Board, imputative to the Board itself (R. 121) , which said instruction was as follows:

The Supreme Court has held that "a limited review could be obtained if the registrant had exhausted his administrative remedies"; he never carried through the administrative process on appeal, and therefore

the subject of classification of registrant by the local selective service board about which so much has been said here in the presence of the jury, must not be considered by the jury or any reference to it by counsel. If the registrant was dissatisfied with the actions and decisions of the board he had his right of appeal.

24. In instructing the jury that the indictment was sufficient, when the evidence produced by the Government does not support a conviction on the charge actually contained in the indictment (R. 106), which said instruction was as follows:

Mr. Angland: Just a minute. That is the crime with which he is charged and the court has passed upon that.

The Court: My instructions will cover that feature of it. That indictment will be held good.

25. In instructing the jury to ignore all the evidence with reference to the administrative features of the case, particularly the classification of the Defendant and the hearing held by the Board thereon, when many of these matters had actually been introduced into evidence, others went to the question of criminal intent, and the prevention by the Board of Defendant's appeal of his classification, and when the Government itself had opened up these questions (R. 121), which said instruction was the same as set forth in Specification No. 23 above.

With reference to Specifications No. 21 - 25 inclusive, Appellant duly entered the following exceptions:

Mr. O'Connell: The defendant excepts to the in-

struction of the court that the indictment in this case is sufficient on the grounds that the evidence produced by the Government does not support a conviction under it.

At this time the defendant excepts to the instruction of the court wherein the court read the entire section of the law setting forth all of the various crimes provided by the Selective Service Law as prejudicial to the defendant in that it is confusing to the jury in that it includes many violations of which the defendant is not charged and it is thereby prejudicial to the defendant.

The defendant excepts to the first special instruction of the court in which the court instructs the jury that the defendant was required to submit to induction in order to resort to the testing, in order to resort to judicial review of the validity of his classification on the grounds that the holding of the United States Supreme Court in Estep vs. U. S., 327 U. S. 114, does not require a registrant to submit to actual induction before he can have judicial review of the validity of his classification. On the further grounds that the Government itself opened up the question of classification through the witness Sammons and the consideration which the local board gave to the record on arriving at the defendant's classification, thus making it permissible for the defendant to adduce testimony with reference to the classification of the defendant.

26. In demonstrating throughout the trial a bias and prejudice against the Defendant and in favor

of the Government, and an assiduous effort to obtain a conviction of the Defendant;

As further error, Appellant specifies as follows:

27. The evidence adduced by the Government does not support the Verdict of the Jury, and a conviction under the charge stated in the indictment.

ARGUMENT

The United States Supreme Court and this Court have by a series of decisions in cases involving the Selective Service Act rather clearly defined the right to judicial review of draft board decisions upon exhaustion of a registrant's administrative remedies, and established the point at where those administrative remedies end, just before actual induction into the armed forces. Estep v. U. S. 327 U. S. 114, Gibson V. U. S. 329 U. S. 338, Saunders v. U. S. 154 F. (2d) 873, and Lawrence v. Yost, 157 F. (2d) 44.

Appellant herein feels that the case at bar raises a new point not found in the cases cited above or any other cases. The Appellant, who was the Defendant below introduced uncontroverted testimony that he had been prevented from taking his appeal from his classification by the action of the Clerk of the draft board, which action was imputative to the Board itself. (R. 87, 88, 89, 90). He was therefore prevented from exhausting his administrative remedies, and should not be barred from pleading the defenses available to him on his trial. This case also brings to bar the additional factor that the Government

itself, Appellee here, on its own initiative opened up matters involving the appellant's classification, (R. 77, 78,) which certainly gave appellant the right to examine the witnesses on these matters following the Government's own action in opening them up.

Appellant will argue that the evidence adduced by the Government does not support the charge contained in the indictment, and that the lower Court erred in denying the motion to dismiss the indictment, and urges this court to dismiss. Erroneous prejudicial rulings, instructions and conduct of the court below are matters of serious argument in this appeal, and will be pressed in the specific argument under each specification of error.

On Specification of Error No. 1, appellant will be brief. Sole counsel for appellant suffered a heart attack shortly after his retention in the case, and after a period of confinement under doctor's order moved the court below to vacate the setting of the case for trial. (R. 5, 6.) The reasons are obvious and genuine. The record discloses what transpired on this motion; the Court suited the convenience of counsel for the Appellee, rather than the situation set forth by counsel for the appellant. (R. 7-12). This we contend was a violation of appellant's right to effective and effectual aid of counsel under the VI and XIV Amendments to the federal constitution, for what value to the Defendant in this case or the accused in any case is the appointment of counsel, if said counsel is handicapped so as to render ineffectual his aid to the ac-

cused. Due process under the above amendments is not satisfied where there is a denial of opportunity for counsel to adequately prepare a defense, and the time to recuperate from an illness so that he may properly defend his client throughout the rigor of a heated trial. See Avery v. State of Alabama, 308 U.S. 444, White v. Ragen, 324 U.S. 760, Hawk v. Olson, 326 U.S. 271.

Because it is most important, and appellant lays heavy stress thereon, we shall take up next Specification of Error No. 3, charging that the lower court erred when it overruled and denied Appellant's motion to dismiss the indictment herein on the ground that the Government had failed to prove the crime charged in the indictment. The argument hereunder shall be applied also to Specification of Error Nos. 20, 24, and 27.

Now the indictment here (R.3) charges a violation of the Act and the regulations by the Appellant, and we quote, "in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States." Now the Government called only one witness, the Clerk of the Board, who was not the clerk at the time of the alleged offense, and she testified only that the appellant had not reported to the local board for transportation to the induction center (R. 19). Now we contend that this is the crime with which appellant should have been charged, and not the crime actually contained in the indictment. We argue that the Appellant could

not commit the crime set forth in the indictment unless he did report to the local board and had gone in to the induction center, passed the physical, moral and social examination, been accepted by the armed forces, and then he could have committed the crime contained in the indictment by evading and refusing to submit to induction and service and to be inducted into the Armed Forces of the United States. Whether or not the Appellant was subject to induction and service and to be inducted into the armed forces, and therefore could evade and refuse is **contingent** upon him passing the examinations at the induction center. If he failed any of them, he would not be subject to induction. The Court of Appeals for the Second Circuit, in U. S. v . Kauten, 133 F. (2d) 703 states in a summation:

> "It is common knowledge that pending this examination, by the military authorities, actual induction is a **contingent** matter." (Emphasis supplied).

The duty to report to the local board for forwarding to an induction station is a duty separate and independent from the duty of submitting to induction and service in the Armed Forces. The violation of that duty is as clearly a crime as is the duty to submit to induction and service. Section 1632.14 of the Regulations states as follows:

> "(b) **Upon reporting for induction, it shall be the duty of the registrant** (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the loca-

tion where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) **to submit to induction,** and (6) **if he is not accepted by the armed forces as to the manner in which he will be transported on his return trip to the local board."**

Section 1632.15 of the Regulations states in part:

"The local board shall inform all registrants in the group that it is their duty . . . . . that they must present themselves for and submit to induction; that if they are rejected . . . . . ."

This we insist shows the separate character of each duty, that is, the duty to report to the board for forwarding to an induction station and the separate duty of submitting to induction if one is not rejected at the induction station.

In Estep v. U. S., 327 U. S. 549, the United States Supreme Court in discussing the criminal section of the Selective Service Act states:

"Section 11 makes criminal a wilful failure to perform **any duty** required of a registrant by the Act or the rules or regulations made under it. An order to report for induction is such a duty; and it includes the duty to submit to induction."

In the course of the trial counsel for the Appellee argued that the sense of that sentence was that the order to report for induction includes the duty to submit to induction. Taken out of context, Appellee's contention would appear correct, but read in the

entire context it is clear that "it" refers not to the order to report for induction but to Section 11 itself.

Appellant, who is now convicted of violation of his duty to submit to induction and service into the armed forces, could still be prosecuted for violation of his duty to report to his local board for forwarding to the induction station. We insist that his conviction under the crime charged in the indictment would not enable him to protect himself from a subsequent prosecution for the crime with which he should have been charged, and an indictment in order to be sufficient must be such that it will permit the accused to plead a judgment in bar of further prosecution for the same offense.

See: U.S. v. Behrman, 258 U.S. 280
Todorow v. U.S., 173 F. (2d) 439 (Certiorari Denied) 337 U.S. 925.
U.S. v. Josephson, 165 F. (2d) 82 (Centiorari Denied) 333 U. S. 838.

The Government here charged the Appellant with a violation of a duty which was two steps or two duties removed from the actual duty he failed to obey. We conclude that the indictment and the evidence produced by the Government at the trial are at fatal variance and the evidence produced was not sufficient to convict the Appellant of the crime actually charged in the indictment and does not support the verdict of guilty on the charge contained in the indictment, and this Court should dismiss the indictment.

Appellant combines his argument on Specifications of Error 2, 4 and 5. These specifications concern

the fact that at the time of his classification, personal hearing and order to report for induction the appellant herein was a married man and regulations at that time made mandatory the deferment of married men. The record discloses that at his pre-induction physical examination the officer in charge of the induction center advised him to report his married status to the board on his return home. This Appellant did by going to the local draft board and reporting to the clerk his married status. This was reduced to writing and placed in his file (R. 20). He was informed by the clerk that "he would be reconsidered and given a different classification." Although he did not use the technical language asking for a change in classification, he certainly reported to the board for that purpose and with that intention. True he did not definitely request in precise language a classification as a married man, but Judge Pope of this Court in Cox v. Wedemeyer, 192 F. (2d) 920, at page 922 stated—

> " . . . that the procedure established under the Selective Service Act, of 1940, was designed to fit the needs of registrants unskilled in legal procedure. . . . It does not conform with the letter or spirit of the Act or of the regulations to construe the language of Appellant's letter under the same strict rule of interpretation applicable to a formal assignment of errors."

The applicable regulation, Section 1622.15 states—

> "Class III-A, Registrants with Dependents. (In Class III-A shall be placed (1) a registrant who has a wife or child with whom he maintains a bona

fide family relationship in their home."

Now this language is clearly mandatory and not permissive, and entitled this Appellant to the appropriate classification. The Court below erred in ruling out the introduction of evidence of the marriage of Appellant under the circumstances here set forth. This was further aggravated by the Court's denial of the admission of evidence of the Appellant's marriage for the purpose of showing a lack of criminal intent and in his sustention of the Government's objection to Appellant's offer of proof thereon. (R. 60, 61, 62). This evidence was necessary to show the condition of the Appellant's mind and lack of criminal intent. He had a right to show why he did not obey the order to report for induction. See Ex Parte Stewart, 47 Fed. Supp. 445. It was error of the Court to exclude this testimony. The Court committed further error on this point when the Court instructed the jury (R. 62) to "pay no attention to that evidence which has been offered here because as you recall heretofore this morning it was clearly shown that no evidence was ever made before the local board or any hearing to present any hearing on the marital status at all." This ruling to the jury was in response to a request by the Government that the Court ask the jury to disregard any reference to the marriage. Now the record clearly shows at Pages 20 and 21, that the Appellant's written statement about his marriage was contained in his file and this testimony was given by the Government witness, the clerk to the draft

board. We may concede that Appellant was not entitled in his trial to a de novo hearing of the evidence, but it is certainly erroneous for the Judge to instruct the jury that there was no evidence submitted to the local board on this point.

Specifications of Error 6 and 7 concern the Court's refusal to permit the introduction of evidence and a denial of an offer of proof that the Appellant had been denied a full, fair and impartial hearing by the board on his classification. (R. 64, 65, 66). That the failure to grant a full, fair and impartial hearing is the basis for a dismissal of the prosecution has been decided in many cases.

Niznik v. U.S., 184 F. (2d) 972;
U.S. v. Peterson, 53 Fed. Supp. 760;
Ex Parte Stanziale, 138 F. (2d) 312.

Appellee, of course, will contend that Appellant has no right to raise these defenses because he did not exhaust his administrative remedies, but the uncontroverted evidence to which the Government offered no rebuttal of any kind, is that the Appellant was prevented and cheated out of his right to appeal and to the exhaustion of his remedies by the action of the local draft board clerk. (R. 87, 88, 89, 90). We think this Court should find that an Appellant thus prevented his appeal should not be denied the right to raise the denial of due process by the local board.

Specifications of Error 8, 9, 10 and 11 have to do with the matter of the Appellant's request for deferment as a conscientious objector. Again we must

keep in mind that Appellant was prevented from taking his appeal by the action of the board. The lower Court was certainly in error when it refused admission of evidence as to whether or not the board had considered Appellant's conscientious objector classification on the basis of authorities cited on the immediately preceding specifications, and the Court erred in refusing the offer of proof made that no evidence of any kind had been taken by the local board on this request and that the board even refused to hear a witness at the hearing as to this claim. This was indeed a denial of due process. On Specifications 10 and 11, we think we stand on good ground because prior to the rulings of the Court to which we object, the Government itself had opened up the whole question of consideration of facts and matters at the hearing on Appellant's classification. (R. 69). The Government having opened the question, the Appellant in his examination certainly had a right to go into these matters and it was reversible error for the Court to permit the Government to go into the matter and then deny the same right to the Appellant. Almost incredible was the Court's ruling that the Appellant had not made any claim for deferment as conscientious objector when the record clearly shows on Pages 69, 70, 71 and 72 that Appellant did make such a claim and it was actually allowed and granted by the local board but never officially given to him. When counsel for the Appellant insisted on the record then the Court modified his statement made in the presence

of the jury that Appellant had "practically" abandoned his claim for this classification. This Court, in Cox v. Wedemeyer, supra, covered this situation when the Court held that "a registrant's letter of appeal to the appeal board protesting his draft classification as a conscientious objector . . . solely on ground that he was a minister of the gospel did not constitute a waiver of his claim . . . that he was a conscientious objector . . . ". In line with that decision we maintain that Appellant did not waive his claim for deferment as a conscientious objector because he insisted on classification as a minister of religion and he had a right to produce this evidence at the trial. To deny it to him was reversible error. This is particularly true when the Government itself had opened up this question.

On Specification of Error No. 12, both the act and the regulations prohibit bias and prejudice on the part of the local board against a registrant because of his religion. Any order issued in conflict with this provision deprives the board of jurisdiction and renders void the order to report for induction. See Estep v. U. S. supra.; Niznik v. U. S. supra.

All of the argument with reference to Specifications of Error Nos. 8, 9, 10, and 11 apply with equal force to Specification of Error No. 13. The Appellant had a right with respect to the rejection of his classification as a minister of religion to determine if the draft board had proceeded on an erroneous basis, because if it had its denial of exemption was illegal.

See the oral opinion in U.S. v. Kose, U.S. District Court, District of Connecticut, No. 8494.

On Specification of Error No. 14, the record discloses that in the presence of the jury the Court announced (R. 87) that Appellant had only the question of intent left in the case. This was before Appellant rested his case and where he later made a definite showing, uncontroverted, that he had been prevented from taking his appeal by the clerk to the board, which action is imputative to the board itself, and particularly when the Government had opened up consideration of everything contained in the Appellant's file. The Appellant had the right to have all of these matters go to the jury under the situation that existed in this case. The whole question of the prevention of the right to appeal is most vital to this case. The Government made no attempt to rebut this evidence, although the Court gave it ample opportunity. Some explanation was made that the witness involved was unable to be present, but that is not sufficient excuse for the Government's failure. Because Appellant finds no cases in point, this question has to be argued from the standpoint of reason, logic and justice. Certainly if a person is prevented by the board from exhausting his remedies, then he cannot exhaust them and thus preserve for himself the right to raise these matters in defense. We assert that the Appellant should not be penalized by the action of the board and certainly the Government should not be permitted to take advantage of its own

wrong. We feel that when a proper showing is made that there was a prevention of appeal, then Appellant should have the right to plead these matters in the limited judicial review accorded where one has exhausted his administrative remedy. See Tung v. U. S., 142 F. (2d) 919. For the board to deprive one of his right to appeal is certainly a violation of procedural due process.

On Specification of Errors Nos. 16 and 17, Appellant contends that the Court erred seriously when it instructed Appellant's counsel not to refer to the administrative features of the case and the actions and orders of the board. Certainly when the Government itself had raised these matters and even admitted that it had (R. 79), to then tell counsel not to refer to them in his closing argument was indeed wrong. The court had permitted evidence of this nature to be produced and introduced during the course of the trial. Although Appellant under the precedents would not be permitted to discuss the matter of classification itself, it should be remembered that the Court made no finding here that there was basis in fact for the classification made by the board. Appellant then had the right to discuss any factual questions relating to the administrative factors of the case that at least went to the jurisdiction of the board to issue a valid order of induction. Estep v. U. S., supra; U. S. v. Zeiber, 161F (2d) 90. It was further uncalled for error on the part of the Court to tell counsel for the Appellant that he could discuss in his closing argu-

ment only the question of intent when the record clearly disclosed that there were other matters properly in evidence and duly admitted by the Court.

On Specifications of Error Nos. 18 and 19, Appellant thinks that the lower Court committed reversible error when he instructed counsel for the Appellant that in his closing argument to the jury he could not discuss the elements of the indictment which had to be proved to sustain the verdict of guilty, nor could he argue that the Government had proved the crime charged in the indictment. (R. 102, 103). Certainly the Government is compelled, in order to obtain a conviction, to prove the elements of the crime, and the crime itself, and Appellant surely has a right to argue to the jury whether or not the Government has done so. This seems to us almost elementary.

On Specification of Error No. 21, Appellant charges that the reading of the entire criminal section of the Selective Service Law, with all of the various crimes set forth therein, and the unfortunate language used in presenting it to the jury was most prejudicial to the Appellant. In a criminal prosecution the court may not instruct on any other crime than that charged in the indictment, so that the deliberation of the jury can be confined to that charge, and not be led to speculation and confusion on all the other extraneous matters which the Court here introduced. It is not hard to see that the jury could have predicated its verdict of guilty on crimes not contained in the indictment. Sinclair v. U. S. 265 Fed. 991 at 993.

The court below committed egregious error in instructing the jury that the Appellant was required to submit to induction to obtain judicial determination of the draft board's order, as cited in Specification of Error No. 23. Appellant merely cites again Estep v. U. S., 327 U. S. 114 and Gibson v. U. S., 329 U. S. 338, and the many times this court has gone to great length to obliterate that contention, which is still very prevalent in the District of Montana. Appellee may contend that this error was not prejudicial, because Apellant had not exhausted his remedies, but again we point out that he was prevented from doing so by the action of the clerk to the local board, and could not exhaust his remedies. This argument can be applied with equal force to our Specification of Error No. 23.

Specification of Error No. 25 speaks for itself. We believe it requires no authority to support it. The Court cannot by instruction take from the jury matters that were admitted into evidence, even by the Government itself. Certainly those facts introduced and admitted without objection as to intent, and the prevention of Appellant's right to appeal are improperly removed by this sweeping instruction, and amounted to a direction to the Jury to bring in a verdict of guilty, for all intents and purposes.

Finally, in its Specification of Error No. 26, the Appellant charges that the Court below demonstrated a bias and prejudice against the Appellant, in favor of the Government, and we think made an assiduous

effort to obtain a conviction. Counsel for appellant deeply respects and admires the Court below, but is constrained to call this Court's attention to the entire record to review the prejudicial conduct of the lower tribunal. From the denial of Appellant's motion to vacate the trial because of the serious illness of counsel to the very statement of the Court on sentencing the Defendant the record is replete with expressions of opinion, comments and remarks upon evidence that could only tend to at least intimate bias on the part of the court. Appellant cites only a few of the more glaring examples:

1) at Page 58 of the record we find upon Counsel's citation of a case in point this statement:

> "The Court: Yes, we haven't any time to go hunting up some decision that is sprung on the spur of the moment on whether it would have any application here or not."

2) his almost tender zeal to protect and to assist counsel for the government, as for instance objections to evidence made by the Court itself when counsel failed to do so; see Page 61 of the record at the bottom of the page, when the following colloquy took place:

> "Mr. Angland: You don't want my objection dictated at this time Your Honor?
> The Court: You might as well. You didn't make it full and complete before, just general."

3) At Page 62:

> "The Court: You heard what I said to the jury and that goes."

4) The entire part of the record concerning Appel-

lant's alleged abandonment of his claim for classification as a conscientious objector from Page 67-78 of the record, where the court aggressively pushed the case of the Government on a most vital point.

For addiditional instances of the Court's conduct, attention is directed to Pages 80, 84 (no objection made by Appellee but court sustains it), 85, 87, 89-90, 102, and 126, of the Record. In cases involving religious differences there should be a full effort to give the accused an impartial trial, but here we find constant and tender cooperation with the prosecution and every ruling of any consequence in its favor, constant reproof to appellant's counsel, unusual restrictions on the argument to the jury, his continual repetition that there was nothing left in the case but intent, all these indicated his opinion of the guilt of the accused with its tremendous influence on the jury. The record of course contains only the words that were uttered, and not the tones and inflections. This conduct particularly in criminal cases should be jealously watched, because it invades the province of the jury, and certainly constitutes reversible error. See U. S. v. Hoffman, 137 F. (2d) 416, at point 11.

CONCLUSION

In conclusion, we submit that the indictment herein should be dismissed. We are sure that this Court will not permit the Government to deprive a man of his rights and remedies, and then allow it to take advantage of its own perfidy. The Appellant here is

sincere and honest in his beliefs and they are undeniably religious beliefs. He has suffered for them by serving two previous penitentiary sentences for the same offense charged here. He has demonstrated thoroughly that he is a conscientious objector. The Government should be content with the two pounds of flesh it has already taken—to exact a third puts Shylock to shame, and if not in the legal technical sense, at least among ordinary people, it constitutes cruel and unusual punishment. It just doesn't seem like Uncle Sam.

Respectfully submitted,
JERRY J. O'CONNELL,
Attorney for the Appellant,
305 Barber-Lydiard Building,
Great Falls, Montana.

Service of the foregoing APPELLANT'S BRIEF, together with receipt of three (3) copies thereof is hereby admitted this.....day of June, 1952.

EMMETT C. ANGLAND,
Asst. United States Attorney,
District of Montana,
Federal Building,
Great Falls, Montana, of
Counsel for the Appellee.

No. 13256

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILEY JAMES WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

DALTON PIERSON,
United States Attorney,
Butte, Montana;

H. D. CARMICHAEL,
Assistant United States Attorney,
Butte, Montana;

EMMETT C. ANGLAND,
Assistant United States Attorney,
Great Falls, Montana.
Attorneys for Appellee.

Filed....., 1952.

....., Clerk.

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Attorneys for Appellee.

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WILEY JAMES WILLIAMS,

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UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, Wiley James Williams, registered under the Selective Service Act of 1948 on September 7, 1948 (R. 17). His occupation at the time of registering was given as "Farmer" (Plffs. Ex. 1-a—certified here as an exhibit, R. 137). Appellant's questionaire was filed with Local Board No. 1, Glacier County, Montana, on September 24, 1948 (R. 17). Appellant filed Conscientious Objector Form No. 150 (R. 17) on November 1, 1948 (R. 18). On August 8, 1950 appellant was classified by the Local Board (Plffs. Ex. 1-j). On August 25, 1950 appellant filed with the Local Board a letter requesting a personal appearance before the Board members in order to present verbal evidence to show why he should be granted a minister's classification (Plffs. Ex. 1-o) and

on the same date appellant filed what is entitled Notice of Appeal from Classification. In that notice appellant submitted a request that his classification be changed from 1-A to a minister's classificaton and stated that he felt that he had been wrongfully classified again (Plffs. Ex. 1-p). Appellant was regularly notified that he would be given a hearing at 7:00 p. m., September 1, 1950 (Plffs. Ex. 1-q). On September 1, 1950 appellant appeared before the Board requesting classification IV-D. His request was denied and he was retained in Class 1-A (R. 18). He was notified of the action taken by the Board (R. 18). On September 22, 1950, a Notice to Report for Armed Service Physical Examination was forwarded to appellant (R. 18). He complied with this Notice and reported on October 2, 1950 (R. 18). He was found acceptable for service and so notified (R. 18-19). On November 27, 1950, an Order to Report for induction was mailed to appellant (R. 19). He was ordered to report for induction on December 14, 1950 (R. 19). He did not report for induction.

No appeal beyond the request for the hearing before the Local Board hereinbefore referred to was ever taken.

On February 16, 1951, an Indictment was returned charging appellant with a violation of the Selective Service Act of 1948 and the Rules and Regulations issued pursuant to the Act (R. 3). Appellant entered a plea of not guilty (R. 4). A trial was had before a jury. The jury returned a verdict of guilty on November 16, 1951 (R. 124) and appellant was by the Court sentenced (R. 13-14).

ARGUMENT

Appellant herein assigns some twenty-seven Specifications of Error (Br. 9-44).

Argument of appellant suggests that this case raises a new point not found in any cases (Br. 44). We direct the attention of the Court to the decision of the Supreme Court of the United States in the case of *Falbo v. United States,* 320 U. S. 549; 64 S. Ct. 346; 88 L. Ed. 305. The facts in this case are not materially different.

We shall attempt in this brief to assemble the numerous Specifications of Error under appropriate headings for discussion.

SUFFICIENCY OF THE INDICTMENT

The Indictment is as follows:

> "On or about the 14th day of December, 1950, in the District of Montana, Wiley James Williams knowingly and wilfully failed and refused to perform a duty required of him under the Selective Service Act of 1948 and the Rules and Regulations issued pursuant to said Act in that he evaded and refused to submit to induction and service and to be inducted into the Armed Forces of the United States." (R. 3).

The appellant herein did not challenge the sufficiency of the indictment or request a Bill of Particulars and has made no showing that he was mislead, surprised or prejudiced by the form of the indictment. He went to trial on the case and at the close of the Government's case he made his first attack upon the indictment (R. 37). There ensued considerable discussion between the Court and counsel (R. 37-55).

The attention of the District Court was directed to a statement in the case of *Estep v. United States,* 327 U. S. 114; 90 L. Ed. 567; 66 S. Ct. 423 (R. 54-55). The full statement is as follows:

> "By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes. Sec. 11 makes criminal a wilful failure to perform any duty required of a registrant by the Act or the rules or regulations made under it. An order to report for induction is such a duty; and it includes the duty to submit to induction. * * * " (Page 119).

Appellant appears to misunderstand. His brief refers to separate and independent duties (Br. 47) and the separate character of each duty (Br. 48). In the case of *Falbo v. United States,* 320 U. S. 549 at 553; 64 S. Ct. 346; 88 L. Ed. 305, the Supreme Court stated:

> "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently."

The indictment in this case is in substantially the same language used by this Court in the case of *Burgtorf v. United States,* 190 F. (2d) 203. The indictment herein alleges the offense in the words of the statute and is clearly sufficient under the provisions of Rule 7(c) of the Federal Rules of Criminal Procedure.

APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES AND ACCORDINGLY THE ACTION OF THE LOCAL BOARD WAS NOT SUBJECT TO JUDICIAL REVIEW

In this case we are dealing with one who rather than serve his country was twice sentenced for a violation of the Selective Service Act of 1940 (R. 91-95) and a Jehovah Witness who admittedly discussed the Selective Service Act with other members of his group at their meetings (R. 96-97) and one who, by his testimony knew how to test the validity of his classification (R. 98).

The appellant herein with all of his knowledge concerning the Selective Service Law knew that when he was classified on August 8, 1950 (Plffs. Ex. 1-j) he had ten days from the date of mailing of the Notice of Classification within which to appeal, (Sec. 1626.2(c) (1) Selective Service Regulations, Appendix) and, of course, the Notice forwarded to him advised him of that fact. Yet the appellant would have this Court believe that by reason of a conversation with the Clerk of the Local Board on October 3, 1950 (R. 87-89) he was prevented from taking his appeal (Br. 44, 52, 55, 56, 58). Just what could the Clerk of the Local Board have done on October 3, 1950 that could be treated as preventing the appeal from a classification made on August 8, 1950? The record will not sustain the appellant's contention or statements in that regard.

The facts of the matter as disclosed by the record are that appellant testified concerning a conversation with

a former Clerk of the Local Board (R. 89-90). Evidence of this conversation was admitted as bearing on the question of intent (R. 89). The conversation, according to appellant's version of it, was that the then Clerk of the Local Board stated upon being advised by appellant that he had been married several months earlier that she was going to mail a different classification to him, or that he would be given a different hearing (R. 90). It is noteworthy that appellant was testifying concerning a conversation with a former Clerk of the Local Board for whom the Government had issued a subpoena and who because of her physical condition was unable to attend the trial (R. 101). At the trial appellant testified that by reason of this conversation with the Clerk of the Local Board he did not comply with the Order to Report for Induction (R. 90). Now on this appeal appellant states that this conversation prevented him from taking an appeal from the classification given to him by the Local Board (Br. 44).

The situation is simply this. Appellant was classified on August 8, 1950. He requested and was granted a hearing before the Board on September 1, 1950 (R. 18) upon his request that he be given a minister's classification. He had been married on July 18, 1950 (R. 89). There is no showing whatever that upon receipt of the classification appellant advised the Board that he had been married, nor did he advise the Board at the hearing on September 1, 1950. His time for appeal expired ten days after the notice of classification was mailed to him (Sec. 1626.2(c) (1) Appendix). The classification of appellant as a registrant with the Local Board could be reopened and considered

anew only upon certain specific grounds provided for in the Selective Service Act. (See Sec. 1625 Appendix).

We submit that the appellant knew what was required of him when he received his Order to Report for Induction. He understood the meaning of the provisions of Section 1632.14 of the Selective Service Regulations (Appendix). He knew there were ways by which his classification could be reopened and considered anew. He knew that the Local Board itself was restricted in the reopening and considering anew of a classification. Appellant herein had been twice convicted for violation of the Selective Service Act of 1940 and admitted that the Order to Report for Induction carried a real meaning for him (R. 94). This young man being well versed concerning the Selective Service Act and Rules and Regulations (R. 85-98) just simply ignored the order to report for induction awaiting the step that he knew would of necessity follow—his indictment by a Grand Jury.

Appellant when he had his hearing before the Local Board on September 1, 1950, did not then advise the Board that he had been married on July 18, 1950. He did on October 3, 1950, as he was required to do, advise the Board of his change of status in this regard. He did not ask that his classification be reopened and considered anew. He waited until he had been indicted, then during the trial attempted to have the Court classify him by reason of his change in status. In support of this contention appellant relies upon the decision of this Court in *Cox v. Wedemeyer,* 192 F. (2d) 920. The facts of that case are very different from the facts presented in this case. In that

case this Court held that the Board of Appeal was required to classify the registrant de novo on the basis of his whole Selective Service record and could not limit its review to the request submitted by the registrant. We are here dealing with a case in which the Board never after September 1, 1950 considered the classification of the registrant as he never requested in accordance with the regulations that the classification be reconsidered nor did he appeal from the classification.

Throughout the Brief submitted to this Court appellant attempts to establish that the District Court was in error in denying to him the right to have all matters before the Selective Service Board gone into and treated de novo by the jury. He cites in support of this *Ex Parte Stewart,* 47 F. Supp. 415 (incorrectly cited by appellant as 47 F. Supp. 445). In the first decision in *Ex Parte Stewart* Judge Yankwich states at the outset:

> "Except where an appeal is authorized the Selective Service Act makes the decision of the Board on classification final. 50 U.S.C.A. Appendix § 310 (a); see; United States ex rel Broker v. Baird, D.CN.Y. 1941, 39 F Supp. 392, 394. In the trial of cases for violations of the Act, the Judges of this district have declined to submit to the jury the question of the correctness of the classification. But they have allowed inquiry to determine whether there was a hearing. And, in submitting the question of guilt or innocence to the jury, we have, invariably, informed them that they do not sit as a court of appeal. * * * "
>
> Ex Parte Stewart,
> 47 F. Supp. 410, 411.

And in the second decision after quoting the provisions of the Selective Service and Training Act of 1940, he states:

"In interpreting this enactment, all the judges of this Court have held that when the time for appeal has elapsed, or an appeal has been instituted and denied, finality attaches to the action of the Board; and that after a person, classified in 1-A, has been ordered to report for induction fails to appear, and wilfully disobeys the order of the Board and is prosecuted, he cannot in such prosecution offer testimony to show that he was not properly classified."

Ex Parte Stewart,
47 F. Supp. 415, 417.

The case of *Ex Parte Stewart* was a Habaes Corpus case, not the kind of a case here presented. Yet the statements of Judge Yankwich hereinbefore referred to support the appellee and not the appellant.

Appellant's Brief suggests that the Court prevented him from showing a lack of criminal intent (Br. 51) and cites the Court to the record herein pages 60, 61 and 62. What counsel at that point was attempting to do was to have the Court classify the registrant. The evidence of the marriage did go to the jury on the question of intent (R. 58, 59, 87, 89, 90) but the Court properly refused to act or permit the jury to act as a Selective Service Board and classify the appellant.

The charge to the jury in this case did submit for consideration by the jury the question of intent. In part the charge was as follows:

"Now there is a question of intent here and it becomes a very important question in this case because this is practically all, or at any rate it is the important issue here because so many other features of the case as I stated a few minutes ago are going to be eliminated." (R. 114).

and the charge in its entirety advised the jury that it could not act as a Selective Service Board and classify the registrant. In part on the subject the District Court charged:

> "Congress legislated to discourage obstruction and delay through dilatory court proceedings that would have been inevitable if judicial review of classification had been afforded.
>
> "The Supreme Court has held that 'a limited review could be obtained if the registrant had exhausted his administrative remedies;' he never carried through the administrative process on appeal and therefore the subject of classification of registrant by the local selective service board about which so much has been said here in the presence of the jury, must not be considered by the jury or any reference to it by counsel. If the registrant was dissatisfied with the actions and decisions of the board he had his right of appeal." (R. 121).

The appellant herein did not exhaust his administrative remedies, but even if he had on the record before the Court there was a basis in fact for the classification made by the Local Board. In the classification questionaire, Section 8, entitled "Present Occupation" (Plffs. Ex. 1-f) appellant stated that he was a farm laborer as he had stated on his registration card (Plffs. Ex. 1-a). Further in the classification questionaire under agricultural occupation in the answer to the question "Other business in which I am now engaged?" his answer, "none" (Plffs. Ex 1-g). What the appellant in this case attempted to do during the trial was to obtain a complete review of the action of the Local Board and have the jury classify him.

In *Estep v. United States,* 327 U. S. 114, it was held that the question of jurisdiction of the Local Board is

reached only if there is no basis in fact for the classification given the registrant. The Court stated in part:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. See Goff v. United States, 135 F. (2d) 610, 612."
>
> Estep v. United States,
> 327 U. S. 114, 122; 90 L. Ed. 567; 66 S Ct. 423.

and in that case the registrant did exhaust his administrative remedies. He did report for induction but refused to submit thereto. The contrary is true in this case.

It is noteworthy that appellant in his Brief does not refer to the decision of this Court in *Cox v. United States,* 157 F. (2d) 787, or the decision of the United States Supreme Court in that case. In these cases it was held that where a classification is susceptible to challenge, the determination of whether a classification is valid is properly one of law for the Court and not one to be passed upon by the jury as contended for by appellant. The pertinent portions of that decision are:

> " * * * In *Estep v. United States,* 327 U. S. 114, we held that a limited review could be obtained if the registrant had exhausted his administrative remedies, and the Circuit Court of Appeals in accordance with that decision reviewed the file of Cox and found that the

evidence was 'substantially in support' of the classification found by the board." (Page 445).

"Petitioners do not limit themselves to the claim that directed verdicts should have been entered in their favor because of the invalidity of their classifications as a matter of law; they claim that the issue should have been submitted with appropriate instructions to the jury. The charge requested by Roisum that he be acquitted if the jury found that he was 'erroneously' classified was improper. In *Estep v. United States* it was distinctly stated that mere error in a classification was insufficient grounds for attack. Cox and Thompson requested charges under which the jury would determine 'whether or not the defendant is a minister of religion' without considering the action of the local board. We hold that such a charge would also have been improper. *Whether there was 'no basis in fact' for the classification is not a question to be determined by the jury on an independent consideration of the evidence.* The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. *Yakus v. United States,* 321 U. S. 414. Although we held in *Estep* that Congress did not intend to cut off all judicial review of a selective service order, petitioners have full protection by having the issue submitted to the trial judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to the jury. Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable 'only if there is no basis in fact for the classification.' *Estep v. United States, supra,* 122. Consequently when a court finds a basis in

the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders. Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration." (Italics ours.) (Pages 452, 453).

"Petitioners are entitled to raise the question of the validity of their selective service classifications in this proceeding. They have exhausted their remedies in the selective service process, and whatever their position might be in attempting to raise the question by writs of *habeas corpus* against the camp custodian, they are entitled to raise the issue as a defense in a criminal prosecution for absence without leave." (Page 448).

Cox v. United States,
332 U. S. 442, 445, 452, 453, 458; 92 L. Ed. 59, 68; S. Ct. 115.

The foregoing we believe fully answers every contention made by the appellant that the jury should pass upon the classification of the registrant.

In the case of *Saunders v. United States,* 154 F. (2d) 872, this Court stated:

"The Court correctly informed appellant that he could not review the board's classification."

The District Court in this case followed that ruling.

The appellant here is in fact objecting to the action of the District Judge in following the decision of the United States Supreme Court in *Cox v. United States,* supra. Yet that case has been followed consistently. Some of the cases following that decision are *Penor v. United States,* 167 F. (2d) 553, 9 Cir. and five other cases: *Miller v. United States,* 169 F. (2d) 865, 6 Cir; *Miller v. United*

States, 173 F. (2d) 922, 6 Cir.; *Jeffries v. United States,* 169 F. (2d) 86, 10 Cir.; *Martin v. United States,* 190 F. (2d) 775 and *Imboden v. United States,* 194 F. (2d) 508.

We are not going to set out in this brief to defend every charge made against the District Judge in the appellant's Brief. The District Judge who tried this case needs no defense. The case was fairly tried. The rulings of the Court were proper. The fairness of Judge Pray is too well known by members of the Bar and Judges throughout the Ninth Circuit to require us to embark upon any defense of his conduct in this case. The record speaks for itself.

One point at which appellant directs his criticism of the District Judge appears under Specification of Error No. 1 wherein he states that he was denied effective and effectual aid of counsel. In his Brief appellant refers to appointment of counsel (Br. 45). Counsel for the appellant in this case was of his own choosing and was not appointed by the Court (R. 12). The Motion for Continuance was heard by the Court on November 2, 1951 (R. 5). The case was reset for November 15, 1951 (R. 12), approximately two weeks time allowed to appellant within which to obtain new or additional counsel. He did not do so. The record clearly shows that appellant's counsel was very zealous in defending appellant. Appellant does not point out to this Court wherein his counsel was not effective and effectual. He does not tell this Court of any evidence available to the appellant that was not presented to the District Court. It is interesting to note that the District Judge who has had many years of experience on

the bench estimated that this case would take a couple of hours to try (R. 11). The trial commenced at 10:00 a. m., November 15, 1951 (R. 15). The jury retired to consider its verdict at 11:40 a. m., November 16, 1951 (R. 123). Every conceivable defense of this appellant was attempted.

THE COURT FULLY AND FAIRLY CHARGED THE JURY

Exception to the District Court reading the entire section of the Selective Service law was made, as being prejudicial (R. 122). The Court before reading the section, advised the jury as follows:

> "Now the law on which that indictment is based I am going to read to you. It is rather lengthy and some of it would apply under different state of facts perhaps but you will find that it also applies here in this case, and that this indictment is properly based upon this Section." (R. 107).

and immediately after reading the Section the District Court made the following statements:

> "Now that is the statute and as I read it through you can see where it applies to this case.
>
> "Now this indictment has already been read to you. I want to read it again so that you will have the terms of it in mind when I read you a special instruction which relates to this very situation here." (R. 109).

Most assuredly the jury was advised fully at the time the section was read.

A further exception was made to the District Court advising the jury that the appellant was required to submit to induction in order to resort to judicial review of his classification. The District Court advised the jury

that a limited review could be obtained if the registrant had exhausted his administrative remedies and that appellant had not carried through the administrative process on appeal (R. 121). We believe the comment of this Court in *Phelps v. United States,* 160 F. (2d) 626, 629 is appropriate:

> "It was to cover cases precisely like the present, in which a convicted defendant seeks to escape condign punishment by raising technical objections, that Rule 52(a) of the new Federal Rules of Criminal Procedure, 18 U.S.C.A. following Section 687, was promulgated."

And in *De Pratu v. United States,* 171 F. (2d) 75, 77 this Court stated:

> "The instructions given by the Court fully and fairly stated the law applicable to the evidence before the jury. See McCoy v. United States, 9 Cir. 169 F. (2d) 776, 784-786."

In this case the instructions of the District Court read in their entirety fully and fairly state the law applicable in this case.

CONCLUSION

The jury that heard the appellant herein testify on the stand took him at his word:

"Q. Did you intend to be inducted?

* * *

A. No." (R. 97-98).

We submit that this Court should likewise take the appellant at his word and affirm the verdict and judgment herein.

Respectfully submitted,

DALTON PIERSON,
United States Attorney;

H. D. CARMICHAEL,
Assistant United States Attorney;

EMMETT C. ANGLAND,
Assistant United States Attorney.

APPENDIX

REOPENING REGISTRANT'S CLASSIFICATION

1625.1 *Classification Not Permanent.*—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 *When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a

registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3 *When Registrant's Classification Shall Be Reopened and Considered Anew.*—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class 1-S because he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

1625.4 *Refusal to Reopen and Consider Anew Registrant's Classification.*—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant

the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

CLASSIFICATION ANEW

1625.11 *Classification Considered Anew When Reopened.*—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 *Notice of Action When Classification Considered Anew.*—When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of Section 1623.4 of this chapter.

1625.13 *Right of Appeal Following Reopening of Classification.*—Each such classification shall be followed by the same right of appearances before the local board and the same right of appeal as in the case of an original classification.

1625.14 *Order to Report for Induction to Be Cancelled When Classification Reopened.*—When the local board has reopened the classification of a registrant, it shall cancel any Order to Report of Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

Appeal by Registrant and Others

1626.2 (c) the registrant, any person who claims to be a dependent of the registrant, or any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, may take an appeal authorized under paragraph (a) of this section at any time within the following period:

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110).

INDUCTION

1632.14 *Duty of Registrant to Report for and Submit to Induction.*—(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives

of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board.

No. 13258

United States
Court of Appeals
For the Ninth Circuit.

CLAUDE E. SPRIGGS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Arizona

No. C-9558 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE E. SPRIGGS,

Defendant.

INDICTMENT

Violation: 26 U.S.C. 145(b) (Attempt to defeat and evade income tax)

The Grand Jury charges:

Count I

That on or about the 22nd day of January, 1945, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, a false and fraudulent income tax return wherein it was stated that he suffered a net loss in income of $147.25 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $5,459.64, upon which said net income there

was owing to the United States of America an income tax of $854.91.

Count II

That on or about the 10th day of January, 1947, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, a false and fraudulent income tax return wherein it was stated that he suffered a net loss in income of $350.61 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $4,051.59, upon which said net income there was owing to the United States of America an income tax of $390.78.

Count III

That on or about the 7th day of January, 1948, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, a false and fraudulent income tax return wherein it

was stated that his net income for said calendar year was the sum of $1,928.19 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $7,048.95, upon which said net income there was owing to the United States of America an income tax of $1,058.03.

A True Bill.

/s/ FRED R. BOYER,
Foreman.

/s/ F. E. FLYNN,
United States Attorney.

[Endorsed]: Filed April 5, 1951.

[Title of District Court and Cause.]

RESPONSE TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Comes Now the United States of America, plaintiff herein, by Frank E. Flynn, United States Attorney for the District of Arizona, and E. R. Thurman, Assistant U. S. Attorney, and in response to defendant's motion for bill of particulars respectfully submits the following:

I.

Count I of the Indictment:		
Net Income for 1944		$5,459.64
Unreported legal fees consist of the following items:		
(a) Fees received from Struckmeyer & Struckmeyer	$2,332.49	
(b) Fees received by Claude E. Spriggs as disclosed by his own bookkeeping records	32.37	
Total	2,364.86	
Legal fees per income tax return	1,900.42	
Legal fees unreported		464.44
Unreported taxable capital gains consist of the following:		
(a) Profit on sale of interest in Hi-De-Ho Bar on 4/29/44 to Mr. Wilburn Brown	2,407.92	
(b) Profit on sale of Lot 13, Block 1, Mountalair Addition, Safford, Arizona, to Mr. Stewart M. Bailey on 8/9/44	908.28	
(c) Profit on sale of real estate contract to Wilburn Brown on 10/30/44, pertaining to realty located at 756 E. Portland, Phoenix, Arizona	500.00	
Total unreported taxable capital gains		3,816.20
Unreported interest income consists of the following:		
(a) Interest received from Mr. Otis Sasser on or about 8/17/44	500.00	
(b) Interest paid by Mrs. Jessie Gomez on various dates during the year 1944	562.50	
(c) Interest paid by Helen Pittman on various dates during the year 1944	88.75	
(d) Interest paid by Mr. Wilburn Brown during each of the months June to December, 1944	175.00	
Interest income unreported		1,326.25
Understatement of net income		5,606.89
Reported net income per return (Loss)		(147.25)
Net income per indictment		$5,459.64

II.

Count II of the Indictment:

Net Income for 1946		$4,051.59
Unreported taxable capital gains consist of the following:		
(a) Taxable profit on sale of real property in Phoenix, Arizona, to Stephen B. Rayburn on 6/1/46	$1,958.21	
(b) Taxable profit on sale of real property located in Safford, Arizona, to the firm of Larson & McBride on 1/7/46	887.50	
(c) Settlement of conditional sales contract and joint venture with Wilburn Brown by payment by Wilburn Brown to defendant on 10/21/46	500.00	
Total unreported taxable capital gains		$3,345.71
Depreciation overstated:		
Overstatment of depreciation by the defendant is the result of his having falsely represented the cost of the property located on Henshaw Road, Phoenix, Arizona, on which he claimed excessive depreciation in the amount of		1,150.69
Reduction of business income:		
This item consists of law practice expense not claimed by the defendant and allowed by the examining Internal Revenue agent		(94.20)
Understatement of net income		4,402.20
Reported net income per return (Loss)		(350.61)
Net income per indictment		$4,051.59

III.

Count III of the Indictment:

Net Income for 1947		$7,048.95
Unreported taxable capital gains consist of the following:		
(a) Taxable portion of profit on sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, to Jesse Arreola on 8/14/47	$1,698.15	
(b) Taxable portion of profit on sale of Lot 5, Eastwood Place, Phoenix, Arizona, to Howard M. Vandenberg on 11/20/47	544.64	
Total unreported taxable capital gains		$2,242.79
Depreciation overstated: This item consists of the overstatement of depreciation by the defendant as the result of his having falsely represented the cost of his property located on Henshaw Road, Phoenix, Arizona, on which he claimed excessive depreciation in the amount of		2,978.60
Understatement of net income		5,221.39
Reported net income per return		1,928.17
Total		7,149.56
Arithmetical error on return		100.61
Net income per indictment		$7,048.95

FRANK E. FLYNN,
United States Attorney for the
District of Arizona.

/s/ E. R. THURMAN,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Copy mailed.

[Endorsed]: Filed May 31, 1951.

In the United States District Court
for the District of Arizona

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

PLEA

Minute Entry of June 18, 1951

This case comes on regularly for plea this day. The defendant is present in person with his counsel, W. T. Choisser, Esquire. The defendant pleads not guilty, which plea is now duly entered.

It Is Ordered that the defendant be allowed fifteen days within which to file any additional pleadings to the indictment.

It Is Ordered that this case be and it is set for trial November 13, 1951, at 10:00 o'clock a.m.

In the United States District Court
for the District of Arizona

Honorable Peirson M. Hall, U. S. District Judge, Specially Assigned, Presiding.

[Title of Cause.]

PROCEEDINGS OF TRIAL

Minute Entry of November 14, 1951

This case comes on regularly for trial this date. E. R. Thurman, Esquire, Assistant United States

Attorney, appears for the Government. The defendant is present in person with his counsel, W. T. Choisser, Esquire.

Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

It Is Ordered that all jurors not empaneled in the trial of this case be excused until further order.

On motion of the court the Rule is invoked and all witnesses are instructed and excluded from the courtroom. Arthur R. Beals and Lloyd Tucker are excluded from the operation of the Rule.

Counsel for Government waives opening statement to the jury and counsel for defendant reserves statement to jury.

Government's Case

William McRae is now sworn as witness on behalf of the Government.

Stipulation filed on November 8, 1951, is now read to the jury by counsel for Government, and counsel now stipulate that portions of said written stipulation may be amended, which amendments are now read into the record.

William McRae is now examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Income Tax Return, 1944.
2. Income Tax Return, 1946.
3. Income Tax Return, 1947.
5. Declaration of Estimated Tax.

The following Government's witnesses are now sworn and examined on behalf of the Government:

Robert R. Weaver.

Wilburn Brown.

The following Government's exhibits are now admitted in evidence:

7. Receipt.
8. Receipt.
9. 3 Receipts.
10. 2 Receipts.

And thereupon, at 12:05 o'clock p.m., It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued

Wilburn Brown is now recalled and further examined on behalf of the Government.

Government's Exhibit 11, check is now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Stewart M. Bailey.

Arthur R. Beals.

Otis Sasser.

Defendant's Exhibits A and B, each a cancelled check, are now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Jessie Gomez.

Vernon H. Householder.

Government's Exhibit 17, check, is now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Helen Pittman.

W. H. (Bill) McBride.

Government's Exhibit 21, draft, is now admitted in evidence.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued until November 15, 1951, at 10:00 o'clock a.m., to which time the jury being first duly admonished by the court, the defendant and counsel are excused.

It Is Ordered that Government's Exhibits 19 and 20 be returned to witness Helen Pittman at conclusion of trial.

In the United States District Court
for the District of Arizona

Honorable Peirson M. Hall, U. S. District Judge, Specially Assigned, Presiding.

[Title of Cause.]

DEFENDANT'S ORAL MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 3 AND ORDER DENYING SAID MOTION

Minute Entry of November 15, 1951

The jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Government's Case Continued

Kemper P. Mauzy is now sworn and examined on behalf of plaintiff.

On stipulation of counsel, portion of records of County Recorder of Maricopa County concerning Struckmeyer property is now read into the record.

The following witnesses are sworn and examined on behalf of the Government:

Thomas S. Krone,
Stephen B. Rayburn,
Howard N. Van Denburgh,
Harry C. Jones,
James A. Struckmeyer,
Marjorie Ross.

Thomas S. Krone is now recalled and further examined on behalf of the Government.

Arthur R. Beals is recalled and further examined on behalf of the Government.

Government's Exhibit 28, Work Sheet, is now admitted in evidence.

And thereupon, at 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m. to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently, at 2:10 o'clock p.m. the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Joseph Morgan is now sworn to report the evidence herein.

Arthur R. Beale is recalled and further examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

29. Statement.
30. Statement.
31. Statement.
32. Statement.
6. Check.

It Is Ordered that the defendant's objections to Government's Exhibits 29, 30, 21, and 32 be sustained.

Lloyd M. Tucker is now sworn and examined on behalf of the Government.

Government's Exhibit 33, Affidavit, is now admitted in evidence.

Government's Exhibit 34, Statement, is now admitted in evidence.

Counsel for Government makes offer of proof, which offer is rejected by the court.

The Government rests.

And thereupon, at 3:30 o'clock p.m., the jury being first duly admonished by the court, is excused until 10:00 o'clock a.m., November 16, 1951.

Counsel for defendant now moves for Judgment of Acquittal as to Count 1 of the Indictment on ground the evidence adduced wholly fails to support or substantiate the allegations of Count 1 and moves to strike portions of the Bill of Particulars pertaining to Count 1.

It Is Ordered that said Motion to Strike and said Motion for Judgment of Acquittal be granted as to Count 1 of the Indictment.

Counsel for defendant now moves for Judgment of Acquittal as to Count 2 of the Indictment on ground the evidence adduced does not substantiate the allegations of Count 2 and moves to strike portions of Bill of Particulars as to Count 2.

It Is Ordered that said Motion to Strike and said Motion for Judgment of Acquittal be granted as to Count 2 of the Indictment.

Counsel for defendant now moves for Judgment of Acquittal as to Count 3 of the Indictment on grounds and for the reasons the evidence adduced does not sustain the allegations of Count 3 and moves to strike portions of Bill of Particulars as to Count 3.

It Is Ordered that subdivisions (a) and (b) of

said Bill of Particulars as to Count 3 of the Indictment be stricken, and

It Is Ordered that said motion for Judgment of Acquittal as to Count 3 of the Indictment be denied.

And thereupon, at 4:50 o'clock p.m., It Is Ordered that the further trial of this case be continued until November 16, 1951, at 10:00 o'clock a.m., to which time the defendant and counsel are excused.

In the United States District Court
for the District of Arizona

Honorable Peirson M. Hall, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

RETURN OF VERDICT

(Minute Entry of November 16, 1951)

The jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

The jury is now advised by the court of court's ruling on defendant's motion for Judgment of Acquittal; and Judgment of Acquittal as to Counts 1 and 2 is now signed by the court.

Defendant's Case

The following defendant's witnesses are now sworn and examined:

Victor H. Pulis,

Fred O. Wilson.

And the defendant rests.

Both sides rest.

And thereupon, at 10:20 o'clock a.m., It Is Ordered that this court do stand at recess. Whereupon, the jury being first duly admonished by the court, the court and counsel retire to Chambers for purposes of settling instructions.

Subsequently, at 11:00 o'clock a.m., the jury and all members thereof, the defendant and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

All the evidence being in, the case is argued by respective counsel to the jury. Whereupon, the court duly instructs the jury and said jury retire at twelve o'clock noon in charge of sworn bailiffs to consider of their verdict.

It Is Ordered that the record show defendant's Motion for Judgment of Acquittal at close of the evidence is denied.

It Is Ordered that the Marshal provide meals for said jury and their bailiffs during the deliberation of this case at the expense of the United States.

Subsequently, the defendant and all counsel being present, the jury return in a body into open court at 2:20 o'clock p.m. and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to wit:

"VERDICT

"C-9558 Phoenix

"UNITED STATES OF AMERCIA,

"Plaintiff,

"Against

"CLAUDE E. SPRIGGS,

"Defendant.

"We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Claude E. Spriggs, Guilty as charged in count three of the indictment.

"Dated:

"CHAS. KORRICK,
"Foreman."

The verdict of guilty is read as recorded and on motion of the court, It Is Ordered that said jury be polled. Whereupon each juror is called by the clerk and asked if this is his verdict and each of said jurors' answers in the affirmative. Whereupon, the jury is discharged from the further consideration of this case and excused until further order.

It Is Ordered that this case be set for sentence Monday, November 19, 1951, at 9:30 o'clock a.m. and referred to Probation Officer for pre-sentence investigation.

It Is Ordered that Government's Exhibits 19, 20, 22, 23, 24, 25, 26 and 27 be delivered to United States Attorney for return to owners thereof.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Claude E. Spriggs, Guilty as charged in count three of the indictment.

Dated:

/s/ CHAS. KORRICK,
Foreman.

[Endorsed]: Filed Nov. 16, 1951.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT

Comes Now the defendant and moves the Court for a judgment of acquittal notwithstanding the verdict, upon the ground and for the reason that the evidence and the whole thereof is insufficient to sustain a conviction of Count III of the Indictment.

/s/ W. T. CHOISSER,
Attorney for Defendant.

[Endorsed]: Filed Nov. 19, 1951.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting testimony and exhibits of witnesses Arthur R. Beals and Lloyd M. Tucker, to which objections were made.

5. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: counsel for the government stated in his argument that defendant had inserted certain items of and for the purpose of taking depreciation upon property listed for the calendar year 1947 and had deliberately inserted an item of $20,000.00 with depreciation thereon of $2,000.00 for the express purpose of evading a tax and which no evidence in the trial of the matter was introduced.

/s/ W. T. CHOISSER,
Attorney for Defendant.

[Endorsed]: Filed Nov. 19, 1951.

In the United States District Court
for the District of Arizona

Honorable Peirson M. Hall, U. S. District Judge, Specially Assigned, Presiding.

[Title of Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL, ETC.

(Minute Entry of November 19, 1951)

This case comes on regularly for judgment and sentence this date. E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. The defendant, Claude E. Spriggs, is present in person with his counsel, W. T. Choisser, Esquire.

The defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and Motion for New Trial are now argued by counsel.

It Is Ordered that said Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict be and it is denied.

It Is Ordered that said defendant's Motion for New Trial be and it is denied.

The defendant is now afforded an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, and the defendant states he is ready for sentence. Thereupon, the Court finds that no legal cause appears why judgment should not now be imposed and renders judgment as follows:

In the United States District Court
for the District of Arizona

No. C-9558—Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE E. SPRIGGS,

Defendant.

JUDGMENT

On this 19th day of November, 1951, at Phoenix, Arizona, came the Attorney for the Government and the defendant appeared in person and by counsel, Wm. T. Choisser, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 26, Section 145 (b), United States Code (attempt to defeat and evade income tax), as charged in count three of the indictment.

The court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine in the sum of $1,000.00 together with the costs of prosecution taxed at $546.98, on said count three of the indictment, and that said defendant be committed to the custody of the Attorney General or

his auhorized representative for imprisonment until said fine is paid or he is otherwise discharged by law.

It Is Ordered that the execution of the judgment herein be and it is stayed until Wednesday, November 21, 1951, at five o'clock p.m., upon the following terms and conditions: That the defendant shall, within the period herein specified, pay to the clerk of this court for deposit in the registry fund, said fine in the sum of $1,000.00, and a sum not less than $500.00 towards the payment of said costs; and upon the expiration of the time to take an appeal if an appeal is not taken, or upon the final disposition of an appeal and the approval and spreading of the mandate affirming the judgment if an appeal is taken and the judgment is affirmed, the money so deposited shall forthwith be transferred by the clerk to the Treasurer of the United States in satisfaction of the fine and payment on the costs herein.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed and Docketed Nov. 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Claude E. Spriggs, 730 West Coronado Road, Phoenix, Arizona.

Name and Address of Appellant's Attorney: William T. Choisser, 505 Luhrs Tower, Phoenix, Arizona.

Offense: Violation of Title 26, U.S.C. 145 (b), Count III of Indictment (attempt to defeat and evade income tax.)

Verdict of guilty as to Count III of indictment returned November 16, 1951;

Judgment of conviction entered on November 19, 1951;

Order denying motion for judgment of acquittal notwithstanding the verdict denied November 19, 1951;

Order denying motion for new trial denied November 19, 1951.

Judgment and sentence to pay a fine of $1,000.00 and costs made and entered November 19, 1951.

I, the above-named appellant, do hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the above-stated judgment and orders.

Dated this 21st day of November 1951.

/s/ W. T. CHOISSER,
Attorney for Appellant.

Copy received.

[Endorsed]: Nov. 21, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY UPON APPEAL

I.

That the Court erred in denying defendant's motion for judgment of acquittal, made at the conclusion of the evidence, and also his motion for judgment of acquittal notwithstanding the verdict upon the ground and for the reason that there was no competent evidence adduced during the trial herein to support the verdict and judgment as rendered herein; that there was no evidence whatsoever tending to show that the defendant had as his net income for the calendar year 1947 the sum of Seven Thousand Forty-eight and 95/100 ($7,048.95) Dollars, and upon which there was due and owing an income tax in the sum of One Thousand Fifty-eight and 03/100 ($1,058.03) Dollars to the United States of America, as alleged in Count III of the indictment herein.

II.

That there was no competent testimony whatsoever introduced as to any acts of the defendant in substantiation of Count III of the indictment, except as might be adduced from the testimony and exhibits introduced in connection therewith of the witnesses Arthur R. Beals and Lloyd M. Tucker, to which testimony and exhibits timely objections were made, and by reason of the rule of law that

statements on conversations with the defendant may not be properly introduced until by independent evidence the corpus delecti of the charge has been proved by separate and independent testimony and showing the connection of the defendant therewith.

III.

That the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

Counsel for the Government stated in his argument that defendant had inserted certain items of and for the purpose of taking depreciation upon property listed for the calendar year 1947, and had deliberately inserted an item of $20,000.00 with depreciation thereon of $2,000.00 for the express purpose of evading a tax and which no evidence in the trial of the matter was introduced.

Dated this 21st day of January, 1952.

Respectfully submitted,

/s/ W. T. CHOISSER,
Attorney for Defendant.

Copy received.

[Endorsed]: Filed Jan. 21, 1952.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To: The Clerk of the United States District Court, in and for the District of Arizona, and to the United States of America, and its attorney, Frank E. Flynn, attorney for appellee:

The appellant herein, Claude E. Spriggs, hereby designates the following record and portions thereof and the transcript of the proceedings and evidence adduced herein to be contained in the record on appeal, to wit:

1. The indictment;
2. The verdict;
3. Motion for judgment of acquittal as to Count 3 of said indictment;
4. Judgment;
5. Reporter's Transcript of Evidence;
6. Exhibits in Evidence;
7. All Minute Entries and Orders pertaining to appellant, made during trial;
8. Motion for New Trial;
9. Notice of Appeal;
10. Statement of Points upon which appellant intends to rely upon appeal;
11. This designation.

Dated at Phoenix, Arizona, this 21st day of January, 1952.

/s/ W. T. CHOISSER,
Attorney for Appellant.

Copy received.

[Endorsed]: Filed Jan. 21, 1952.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF RECORD ON APPEAL

To: The Clerk of the United States District Court, in and for the District of Arizona, and to Claude E. Spriggs and his attorney, W. T. Choisser:

The Appellee herein, United States of America, hereby designates the following record and portions thereof to be contained in the record on appeal, to wit:

1. Order denying apellant's motion for judgment as to Count III of said indictment.

2. Order denying defendant's motion for new trial.

3. This designation.

Dated at Phoenix, Arizona, this 30th day of January, 1952.

FRANK E. FLYNN,
United States Attorney;

/s/ E. R. THURMAN,
Assistant U. S. Attorney.

Copy received.

[Endorsed]: Filed Jan. 30, 1952.

In the United States District Court
for the District of Arizona

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

ORDER EXTENDING TIME TO DOCKET APPEAL

(Minute Entry of December 21, 1951)

On motion of W. T. Choisser, Esquire, counsel for defendant,

It Is Ordered that the defendant's time within which to file the Record on Appeal herein and docket the Appeal in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including January 30, 1952.

In the United States District Court
for the District of Arizona

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

ORDER EXTENDING TIME TO DOCKET APPEAL

(Minute Entry of January 25, 1952)

It appearing to the Court that the defendant's Designation of Record on Appeal was filed herein

on January 21, 1952, and that the Government has ten days thereafter within which to file its designation of additional portions of Record on Appeal, and that the time for docketing the Appeal herein expires January 30, 1952,

It Is Ordered that the time of the defendant in which to file the Record on Appeal herein and docket the Appeal in the United States Court of Appeals for the Ninth Circuit be and it is extended to and including February 16, 1952.

In the District Court of the United States
for the District of Arizona

C-9558-Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE E. SPRIGGS,

Defendant.

REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly to be heard before the Hon. Peirson M. Hall, Judge of the United States District Court, specially assigned, presiding with a jury, commencing at the hour of 10 o'clock a.m. on the 14th day of November, 1951.

The Government was represented by E. R. Thurman, Esq., Assistant United States Attorney.

The defendant, Claude E. Spriggs, was represented by W. T. Choisser.

The following proceedings were had:

The Clerk: Case Number C-9558, Phoenix, United States of America, plaintiff, versus Claude E. Spriggs, defendant, for trial.

Mr. Thurman: The Government is ready, your Honor.

Mr. Choisser: The defendant is ready.

The Court: The defendant is present in person?

Mr. Choisser: The defendant is present in person.

The Court: Very well, call the jury.

(Whereupon, 28 prospective jurors were called and seated in the jury box.)

The Court: Very well, ladies and gentlemen of the jury, you are called here this morning to sit as jurors in the trial of a criminal case. It is Case Number C-9558 in this Court, wherein the United States is plaintiff and Claude E. Spriggs is the defendant. The Government is represented by Frank E. Flynn, the United States Attorney, who is not present in Court, but the case will be presented by Mr. E. R. Thurman, the Assistant United States Attorney. I don't know whether all of you know Mr. Thurman or not. Will you stand up so they can all see you?

(Mr. Thurman arose in the courtroom.)

The Court: Very well. Do you have your assistant here?

Mr. Thurman: This is Mr. Tucker from the Internal Revenue who worked on the case.

The Court: Worked on the case. Mr. [2*] Tucker, stand up and turn around so they can all see you.

(Mr. Tucker complies.)

The Court: Mr. Tucker, of the Internal Revenue Bureau, who will assist Mr. Thurman in connection with the presentation of the case to the jury.

The defendant is present in person, Mr. Claude E. Spriggs. Will you stand up, Mr. Spriggs?

(Whereupon Mr. Spriggs complies.)

The Court: Turn around so they can see you.

(The defendant complies.)

The Court: Thank you. He is represented by Mr. W. T. Choisser. Do I pronounce your name correctly?

Mr. Choisser: Choisser.

The Court: All right, turn around so they can all see you.

(Mr. Choisser complies.)

The Court: The charge here is contained in three counts. It is asserted that the defendant violated the United States Code, the Internal Revenue Statutes. He is charged in the first count with an attempt to defeat and evade income tax which it was alleged to be due from him during the year

*** Page numbering appearing at top of page of original Reporter's Transcript.**

1944, in that on or about the 22nd day of [3] January, 1945, in this District and in this Division, he attempted to defeat and evade a large part of the income tax due from him for the year 1944 by filing and causing to be filed a false and fraudulent income tax return, wherein it was stated that he suffered a net loss in income of $147.25, and that the amount of tax due thereon was nothing, whereas, the Government asserts that his net income for the calendar year was, in truth and in fact, $5,459.64 and that he is alleged to have owed an actual tax of $854.91.

In Count 2 it is charged that on or about the 10th day of January, 1947, here in this District and in this Internal Revenue Office, he attempted to defeat and evade a large part of the income tax due and owing for the year 1946, by filing what is alleged to have been a false and fraudulent income tax return, wherein he stated he suffered a net loss of $350.61 and he owed no tax, wherein the Government asserts, in truth and in fact, that his actual income was $4,051.59, and that the actual amount of his alleged tax due is $390.78.

In Count 3 it is charged that on the 7th day of January, 1948, he attempted wilfully and [4] knowingly—each one of these charges that he wilfully and knowingly attempted to evade a large part of his tax for the calendar year, '47, by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent return for that year, wherein he stated his net income for the calendar year was $1,928.19, and that the amount of tax due

is none, whereas, the Government asserts that his actual income—net income for that year was $7,048.95, and that his actual tax due is alleged to have been $1,058.03.

I omitted to state as to each of the counts when I summarized them to you, that it is charged that he did wilfully and knowingly attempt to defeat and evade his tax.

At the appropriate time during the trial you will be instructed, of course, that wilfullness is an essential element of the offense.

(Whereupon, the jury was examined on their voir dire by Court and counsel for both sides, after which, 12 jurors were selected and duly sworn to preside during the proceedings.)

(Thereupon a short recess was had.) [5]

After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: The Court on its own motion will make an order excluding all witnesses until such time as they are called to the witness stand. The bailiff will show you where the witness room is, where you can stay until you are called. All witnesses are excused except Mr. Tucker.

Mr. Thurman: Mr. Beal, they are both in this case from different angles.

The Court: Mr. Beal, you can come up here and sit at the counsel table if you wish.

Mr. Thurman: I'd rather for him to sit back in the courtroom.

The Court: All right, you can sit inside of the rail. Does the defense have any accountants or somebody you desire to have——

Mr. Choisser (Interrupting): Not at this time, if your Honor please, no, we do not have.

The Court: Very well.

Mr. Thurman: We have no opening statement on behalf of the Government. We will start in with our case.

The Court: Very well, the Government [6] waives its opening statement. Does the defense wish to make an opening statement?

Mr. Choisser: We reserve our statement at this time.

The Court: The defendant reserves his statement. You may proceed.

Mr. Thurman: Mr. McRae—William McRae.

WILLIAM McRAE

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

The Court: Now, I notice a stipulation here in the file.

Mr. Thurman: Yes, your Honor.

The Court: Do counsel wish to read it to the jury at this time or later?

Mr. Thurman: I think it would be a good time to do it now while we are a little fresher.

The Court: Very well, the parties have entered into a stipulation here concerning the existence of certain facts. You are to take these facts as proven and as existing without any further proof.

(Testimony of William McRae.)

(Whereupon, the following stipulation was read to the jury by Mr. Thurman.) [7]

Mr. Thurman: "Comes now the United States of America, plaintiff herein, by Frank E. Flynn, United States Attorney for the District of Arizona, and E. R. Thurman, Assistant U. S. Attorney, and the defendant, Claude E. Spriggs, by his attorney, W. T. Choisser, and stipulate as follows:

"That the records of the County Recorder for Graham County, State of Arizona, will show the following transfers of property:

"1. Sale by Lola Farmer to Claude E. Spriggs of Lot 13, Block 1, Mountclair Addition, Safford, Arizona, on November 15, 1940.

"2. Sale by Claude E. Spriggs to Stewart M. and Thelma B. Bailey of Lot 13, Block 1, Mountclair Addition, Safford, Arizona, on August 9, 1944.

"3. Sale by Eldon Palmer to Evelyn Lee Spriggs on May 18, 1943, of a farm situated north of the Gila River in Graham County, as recorded in Book of Deeds No. 45, Page 467.

"4. Sale by Evelyn Lee Spriggs and Claude E. Spriggs of a farm situated north of the Gila River in Graham County to Vidal and Jessie Gomez on September 11, 1943.

"5. Sale by Sam Bunin to Claude E. [8] Spriggs of Lots 1 and 2, Block 9, Lassiter Addition, Safford, Arizona, on January 2, 1942.

(Testimony of William McRae.)

"6. Sale by Claude E. Spriggs to Helen Pittman of Lots 1 and 2, Block 9, Lassiter Addition, Safford, Arizona, on October 5, 1943.

"7. Sale by Jessie Udall to Marion Lee of part of Lot 4, Block 6, Townsite of Safford, Arizona, on December 24, 1938.

"8. Deed from Marion Lee to Evelyn Lee Spriggs of part of Lot 4, Block 6, Townsite of Safford, Arizona, on December 24, 1938.

"9. Sale by Claude E. Spriggs to the firm of Larson and McBride, of part of Lot 4, Block 6, Townsite of Safford, Arizona, on January 7, 1946.

"That the records of the County Recorder for Maricopa County, State of Arizona, will show the following transfers of property:

"1. Real estate contract dated October 15, 1944, from F. C. Struckmeyer, et ux., to Claude E. Spriggs, et ux.

"2. Assignment on October 30, 1944, to Wilburn Brown of a real estate contract dated October 15, 1944, from F. C. Struckmeyer, et ux., to Claude E. Spriggs, et ux.

"3. Sale by Nellie B. Wilkinson to Claude E. Spriggs on February 17, 1945, of Lots 1, 2, 3 [9] and 4, Porter and Baxter's Subdivision of Tract 'B,' Phoenix, Arizona.

"4. Sale by Claude E. Spriggs to Stephen B. and Hazel M. Rayburn on June 1, 1946, of Lots

(Testimony of William McRae.)
1, 2, 3, and 4, Porter and Baxter's Subdivision of Tract 'B,' Phoenix, Arizona.

"5. Sale by Frank and Connie Murphy to Claude E. Spriggs on May 28, 1945, of Lots 47 and 48, Block 2, Eubanks Tract, Phoenix, Arizona.

"6. Sale by Jacob Eglar to Claude E. Spriggs on January 19, 1945, of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona.

"7. Sale by Claude E. Spriggs to Jesse Arreola on August 14, 1947, of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona.

"8. Sale by Katherine Moss Fisher to Claude E. Spriggs on September 22, 1947, of Lot 6, plus the south 4 feet of Lot 5, Eastwood Place, Phoenix, Arizona.

"9. Sale by Claude E. Spriggs to Howard M. and Ruth Van Denburgh on November 20, 1947, of Lot 6, plus the south 4 feet of Lot 5, Eastwood Place, Phoenix, Arizona.

"It is further stipulated that the Court and jury may consider the foregoing records in evidence the same as if the original records had [10] been introduced in evidence.

"This stipulation is made for the purpose of expediting the trial of the above-entitled cause and to avoid the necessity of introducing in evidence the original records covering the transfers above enumerated.

(Testimony of William McRae.)

"Dated this 8th day of November, 1951.

"Frank E. Flynn, United States Attorney,

"(Signed) E. R. Thurman, Assistant U. S. Attorney.

"(Signed) W. T. Choisser, Attorney for Defendant."

Mr. Choisser: Your Honor please, I think it will also be stipulated by counsel that Evelyn Lee Spriggs signed this as regards to Item Number 4, on the first page, Mr. Thurman.

The Court: That sale by Evelyn Lee Spriggs and Claude E. Spriggs of a farm situated north of the Gila River?

Mr. Choisser: The sale by Eldon Palmer, if your Honor please, the one before, Number 3, the sale to Evelyn Lee Spriggs of that same farm.

The Court: Yes.

Mr. Choisser: What is meant by the stipulation is that this deed shows that the property was in the name of Evelyn Lee Spriggs as her sole [11] and separate property.

The Court: Well, it doesn't say that here.

Mr. Choisser: No, I say——

The Court (Interrupting): But that is understood; that is the stipulation, is it?

Mr. Thurman: Yes.

The Court: In other words, that the farm north of the Gila River in Graham County was acquired by Evelyn Lee Spriggs as her sole and separate property on May 18th, 1943?

(Testimony of William McRae.)

Mr. Choisser: And the deed so shows, the original deed.

The Court: And the deed so shows?

Mr. Choisser: Yes, your Honor.

The Court: And the sale of the property on September 11th, 1943, the deed was joined in by Claude E. Spriggs?

Mr. Choisser: Yes, the deed was joined in by him. That will be explained later.

The Court: All right.

Mr. Choisser: Also as to Items 8 and 9 on the following pages the same situation exists.

The Court: That is to say, as to Lot 4, Block 6, Townsite of Safford, Arizona, a deed from Marion Lee to Evelyn Lee Spriggs as her sole and separate property on December 24th, 1938, and [12] on January 7th, 1946——

Mr. Choisser (Interrupting): It was transferred by joint deed joined in by the defendant.

The Court: Well, it says: "Sale by Claude E. Spriggs."

Mr. Choisser: Well——

The Court: And Evelyn——

Mr. Choisser (Interrupting): Well, the word "sale" is a conclusion. The deed shows, and we will explain it, that that deed given by Marion Lee to Evelyn Lee Spriggs was her sole and separate property and it is joined in by Claude E. Spriggs. That is, the deeds will show this.

Mr. Thurman: I don't think there is any——

The Court (Interrupting): Do you so stipulate?

(Testimony of William McRae.)

Mr. Thurman: Yes, sir.

The Court: Very well, you may proceed.

Direct Examination

By Mr. Thurman:

Q. Please state your name?

A. William McRae.

Q. Where do you live? [13] A. Phoenix.

Q. How long have you lived here in Phoenix, Arizona? A. Oh, over 25 years.

Q. And during that 25 years what has been your business or occupation, Mr. McRae?

A. I have been with the Internal Revenue Service all of that time, or more than 18 years.

Q. Whereabout is that service?

A. Phoenix.

Q. Here in Phoenix, Arizona?

A. That is right.

Q. Just what are your duties and responsibilities at the present time with respect to your employment by the Government in the Internal Revenue Department?

The Court: Excuse me a moment. The State of Arizona is the Internal Revenue District?

The Witness: The entire State constitutes one district.

The Court: What district?

A. The District of Arizona.

Q. Does it have a number?

A. It does not have a number.

(Testimony of William McRae.)

Q. Just Internal Revenue, District of Arizona with headquarters at Phoenix? [14]

A. That is right.

The Court: Very well.

The Witness: What was the question?

(The last question propounded to the witness was read by the reporter.)

The Witness: Generally, it includes the supervision of the income tax division. Under the heading of that division I engage in processing and handling of the income tax returns.

The Court: Are you an Internal Revenue Agent or are you a Deputy Collector?

A. I am a Deputy Collector, head of the income tax division in the Collector's office.

The Court: Very well.

Mr. Thurman: Were you subpoenaed to bring certain records here today, Mr. McRae, from the office here in Phoenix? A. I was.

Q. And were you subpoenaed to bring the income tax records of the defendant Claude E. Spriggs for the years 1944, '46 and '47?

A. Yes.

Q. Did you bring them? A. I did.

Q. Have you them there?

A. I do have (presenting documents to Mr. [15] Thurman.)

Mr. Thurman: Please mark the purported income tax returns for 1944 as Government's Exhibit 1 for identification.

(Testimony of William McRae.)

(Whereupon the document was marked as Government's Exhibit 1 for identification.)

The Court: I take it that in view of the stipulation that was read to the jury, that it may also be stipulated that Claude E. Spriggs and Evelyn E. Spriggs are husband and wife?

Mr. Choisser: That is right.

The Court: And have been at all times since what date?

Mr. Choisser: Mentioned herein or in connection with this since 1944, or what is the actual date, Mr. Spriggs?

The Defendant: '28.

Mr. Choisser: Since 1928, if your Honor please.

The Court: '28?

Mr. Choisser: '28.

The Court: Very well, you stipulate to that?

Mr. Thurman: Oh, yes.

The Court: Very well.

Mr. Thurman: And would you mark the purported [16] income tax return of the defendant for 1946 as Government's Exhibit 2 for identification.

(Whereupon the document was marked as Government's Exhibit 2 for identification.)

Mr. Thurman: And mark the purported income tax return of the defendant for '47 Government's 3 for identification.

(Whereupon the document was marked as Government's Exhibit 3 for Identification.)

(Testimony of William McRae.)

The Court: Is there need to be further foundation, Mr. Choisser?

Mr. Thurman: I was going to shorten it by making the offer at this time.

The Court: Are you offering them in evidence?

Mr. Thurman: Yes, the offer is made, your Honor.

Mr. Choisser: Your Honor please, I think there are some other papers that are attached to these that probably are not a part of the original returns that were filed. I don't believe these are admissible.

Mr. Thurman: I will be glad to take them off the returns.

The Court: All right.

Mr. Thurman: Will you examine Government's 1 [17] for identification, and the other two (addressing Mr. Choisser).

Mr. Choisser: They may be admitted.

Mr. Thurman: Thank you.

The Court: In evidence as Exhibits 1, 2, and 3.

(Whereupon the documents were marked as Government's Exhibits 1, 2 and 3 in evidence.)

Mr. Thurman: Mr. McRae, will you look at these Government's Exhibits 1, 2 and 3 in evidence and I will ask you one question. I will ask you first whether you are familiar with these exhibits?

A. I am.

Q. Can you tell the Court and jury whether or not the defendant, in those exhibits, has shown re-

(Testimony of William McRae.)

ceipt for the years for which those income tax returns stand for, any interest; does it show any receipt of any interest?

Mr. Choisser: Just a minute, we object to that. The exhibit is now in evidence. It shows for itself what it contains and what it does not contain. This would be merely the witness' opinion on that.

The Court: Let me see the exhibits.

Mr. Choisser: It speaks for itself, if your [18] Honor please, the exhibit does.

The Court: The objection is sustained.

Mr. Thurman: Please mark this purported—this Form 1099 as Government's Exhibit 4 for Identification.

(Whereupon the document was marked as Government's Exhibit 4 for Identification.)

Mr. Thurman: And this purported Declaration of Estimated Tax for the calendar year '44, as Government's Exhibit 5 for Identification.

(Whereupon the document was marked as Government's Exhibit 5 for Identification.)

Mr. Thurman: Mr. McRae, I hand you Government's Exhibit Number 4 for Identification and ask you to examine that and state whether or not you can identify it?

A. I can identify it, yes.

Q. Where did that come from, do you know?

A. Information Return. This is an Information Return Form 1099 covering the payment or——

(Testimony of William McRae.)

Mr. Choisser (Interrupting): Just a minute, if your Honor please, may we see the exhibit?

The Court: I think so.

Mr. Thurman: I did not mean for the witness to go quite so far. [19]

The Court: Well, let him look at it and save time.

Mr. Thurman: While you are looking at that I will ask him a question about this.

The Court: Well, he will want to see that one.

Mr. Choisser: Well, if your Honor please, we will object to this as not binding on the defendant.

The Court: Yes.

Mr. Choisser: Government's Exhibit Number 4, we will object to it because it is immaterial, is not signed by the defendant and has no relation to the defendant except what somebody else said.

Mr. Thurman: That may be true, but that is not the reason I am examining the witness.

The Court: I am afraid the objection is good.

Mr. Thurman: The objection is perfectly good, your Honor, but I wanted to ask him one question. That exhibit that the Court holds in his hand——

The Court (Interrupting): Why don't counsel come to the bench and you can tell me the purpose of this without the presence of the jury.

(Whereupon counsel for both sides conferred with [20] the Court at the bench in a conversation inaudible to the jury, as follows:)

Mr. Thurman: I merely want to show that this

(Testimony of William McRae.)

is attached, these are the papers we removed from the income tax return in '44. I just want to show it was attached to it.

Mr. Choisser: When the defendant filed it?

Mr. Thurman: No, today, just now, it was removed from them, also I can identify it—can be all tied together when I put on Sasser.

Mr. Choisser: We can't be bound by what you believe.

Mr. Thurman: I am not asking him, just that he took it off of there.

The Court: It wouldn't make any difference.

Mr. Thurman: All right.

(The following proceedings continued within the hearing of the jury.)

Mr. Thurman: I offer Government's Exhibit 5 in evidence.

The Court: Five?

Mr. Thurman: Five, I offer that in evidence.

The Court: Wasn't that 4 we were looking at?

Mr. Choisser: Four we were talking about. [21]

The Court: Oh, you don't offer 4?

Mr. Thurman: No, I will withdraw that, I can tie that up later. I don't need it now. I don't offer 4.

Mr. Choisser: There is no objection to Number —Government's Exhibit Number 5 for Identification being marked in evidence.

The Court: Five is in evidence.

(Testimony of William McRae.)

(Whereupon the document was marked as Government's Exhibit 5 in evidence.)

Mr. Thurman: And, Mr. McRae, this is one of the papers you removed from the income tax return in evidence——

Mr. Choisser (Interrupting): Just a moment, if your Honor please, we object to counsel leading the witness. That was just what the conversation just ensued was.

The Court: The objection is sustained.

Mr. Thurman: That is all, you may cross-examine.

The Court: Cross-examine.

Cross-Examination

By Mr. Choisser:

Q. Mr. McRae, how long have you known the defendant Claude E. Spriggs? [22]

A. Oh, since he was a small boy, 30 years, I guess.

Q. And were you in the office of the Collector of Internal Revenue when the exhibits that have been introduced in evidence were first filed?

A. Yes.

Q. And how long prior to that time?

A. I have been there since 1933.

Q. You have had numerous conversations with Mr. Spriggs during the time of the filing of these income tax returns and since then, have you not?

A. I have had some conversations, yes.

(Testimony of William McRae.)

Q. A number of times?

A. Well, several times.

Q. And concerning the amount, or, if any, of the income tax due concerning these exhibits?

A. My conversations did not relate——

Mr. Thurman (Interrupting): I object to the cross-examination, no foundation for it. I went into no conversation between this witness and the defendant, your Honor.

The Court: Sustained.

Mr. Choisser: That is all.

The Court: The witness is excused. Next witness. [23]

Mr. Choisser: May it please the Court, the witness may be excused but subject to being recalled if we do need at times.

The Court: He will be available.

Mr. Choisser: He will be available.

The Court: All right, you will come by telephone call.

Mr. Thurman: That may also apply to the Government because we may need him back and forth.

The Court: Either side, yes.

Mr. Thurman: All the witnesses we put on we may have to do that.

The Court: All right. [24]

* * *

ARTHUR R. BEALS

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Thurman:

Q. Please state your name?

A. Arthur Beals—Arthur R. Beals. [91]

Q. Where do you live?

A. At present I am living in Mesa.

Q. In Arizona, here?

A. Yes, sir; Mesa, Arizona.

Q. Have you ever held any official position with the Federal Government of the United States?

A. Yes, sir.

Q. And what was it?

A. Deputy Collector Internal Revenue, Arizona District.

Q. How long were you here, Mr. Beals?

A. I was in that capacity for approximately nine and one-half years, including two years that I served in the Army.

Q. Then what were your duties as such officer?

A. As a Deputy Collector it was my duty to investigate tax matters and at times assist in the preparation of returns, but—now, the majority of my work consisted of investigation of verification of returns that had been filed and made record in the District Office.

Q. I see. Now, when did you leave the services, if you did, of the Federal Government?

(Testimony of Arthur R. Beals.)

A. I left the service as of September 7th of this year. [92]

Q. What employment have you now?

A. I am now employed as Assistant Professor of Accounting at the Arizona State College at Tempe.

Q. Did you have occasion at the time that you were an investigator for the income tax division of the Internal Revenue to work on this case now before the Court? A. I did.

Q. Now, limiting your testimony to the Stuart M. Bailey deal, are you familiar with that?

A. Yes. I would have to refer to my——

Q. (Interrupting): Are you familiar with it, you know what I am talking about?

A. Yes, sir.

Mr. Thurman: Please mark these two sheets of paper purported to be a transcript from the books of "C. E. S." as a Government's Exhibit.

The Court: Fifteen.

(Whereupon the document was marked as Government's Exhibit 15 for Identification.)

Mr. Thurman: Did you investigate, Mr. Beals, the sale by Claude E. Spriggs, the defendant, of the property to Mr. Stuart Bailey?

A. Yes, sir. [93]

Q. And just what sort of an investigation did you make with respect to that particular matter?

A. As to the—as to that particular piece of property, of course, I was concerned with the——

The Court: No.

(Testimony of Arthur R. Beals.)

Mr. Thurman: Not what you were concerned with, what did you do?

The Court: What did you do?

A. I reviewed what records were supplied to me by Mr. Spriggs and from that compiled all the information that I could find relative to this particular piece of property.

Mr. Thurman: And what were you attempting to learn from that particular investigation?

A. The cost of the property—as regards that piece of property I was concerned about the cost and the selling price.

Q. The cost to whom?

A. The cost to Mr. Spriggs and the amount that he received in the sale of that property.

Q. Now, do you know—did he furnish you with this data, the books? A. Yes, sir.

Q. Do you know where those books are [94] now? A. I do not.

Q. You don't know whether the Government has them or where they are?

The Court: Where did you last see them?

A. I returned them to Mr. Spriggs.

Mr. Thurman: As far as you know, he has the books?

A. So far as I know, he still has them, but I do not even know if they exist.

Q. What did you do; did you make any record at all of the investigation?

A. Yes, sir. As to that particular transaction I

(Testimony of Arthur R. Beals.)

—that particular piece of property I believe I found a transcript.

Q. Not what you found, what did you do?

A. I made a transcript of an account in Mr.— that I found in Mr. Spriggs' books.

Q. I am going to hand you Government's Exhibit 15 for Identification, and I am going to ask you if this is the transcript that you mentioned?

A. Yes, sir; it is.

Q. Now, from an investigation and perusal that you made of the records furnished you by Mr. Spriggs, were you able to determine, Mr. Beals, the cost of that particular piece of [95] property to him?

A. Yes, sir; as reflected by his books.

Q. And what did you find that amount to be?

Mr. Choisser: Just a minute, if your Honor please, we will object to that as being irrelevant and immaterial and incompetent at this time, no proper foundation laid.

The Court: Sustained, no foundation laid. Did you ever show that transcript that you have in your hand there to Mr. Spriggs afterwards?

A. I cannot say that I did not. We were together on different occasions and discussed this particular piece of property, the cost and the source of the figures.

Q. Did you show him that document or have any discussion with him? A. Yes.

Q. When you had the document before you?

A. Yes, sir.

(Testimony of Arthur R. Beals.)

Q. You showed him the document?

A. Yes, I am sure he saw this document, I am sure he saw this document.

Q. Are you guessing now, or do you recall the particular occasion?

A. Yes, I recall the particular occasion.

The Court: All right. [96]

Mr. Thurman: When was it?

A. It was at a conference at the Office of the Collector of Internal Revenue, and I believe it was in September of '48.

Q. And who was present at that time?

A. Mr. Tucker of the Intelligence Unit.

Q. This gentleman here (indicating Mr. Tucker)?

A. Yes, sir; and Mr. Spriggs and myself.

Q. And was anything mentioned as to the respective items disclosed in the sheet?

A. Yes, sir.

Q. And were you able to determine—did you determine the amount that the property cost Mr. Spriggs?

Mr. Choisser: Just a minute, your Honor please, we still renew the same objection heretofore made.

The Court: Objection is sustained, no foundation laid.

Mr. Thurman: That is all for the present on that.

The Court: I think we might have the afternoon recess. The reporter's hand gets tired and that is as good an excuse as anything.

(Testimony of Arthur R. Beals.)

(Whereupon a short recess was had.) [97]

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows):

The Court: The record may show the defendant is present in person by counsel and the jury is in their respective places.

Mr. Thurman: Your Honor, I am forced to put this witness back on for some further remarks. I found some other papers I overlooked.

The Court: All right.

Mr. Thurman: I thank you, your Honor.

ARTHUR R. BEALS

a witness on behalf of the Government, resumed the witness stand and testified further as follows:

Direct Examination
(Resumed)

By Mr. Thurman:

Q. Now, referring to Government's Exhibit 15 for Identification, you testified that you did discuss this with Mr. Spriggs? A. Yes, sir.

Q. And about when was that?

A. I was mistaken as to the date in my first answer to the question. It was at a later [98] date and the defendant has signed a note——

The Court (Interrupting): Wait, now, the conversation.

(Testimony of Arthur R. Beals.)

Mr. Thurman: Never mind. About when was it, as near as you can tell.

A. It was prior to January 29th of '49.

Q. What period of time was it that you made this compilation here, which is Government's Exhibit 15 for Identification, do you remember when you made it, about?

A. I think it was in September that I made the transcript referred to.

Q. All right. Now, subsequent to the time that you claim you showed that to Mr. Spriggs, did you meet again with Mr. Spriggs with respect to this matter? A. Yes.

Q. When was that? A. January 29th.

Q. January 29th of what year? A. '49.

Q. And was the sale of the Stuart M. Bailey property discussed at that time?

A. Yes, it was.

Q. And was any statement prepared and presented to Mr. Spriggs at that time? [99]

A. Yes, sir.

Mr. Thurman: Please mark this paper here dated December 31st, 1942, as a Government's Exhibit.

(Whereupon the document was marked as Government's Exhibit 16 for Identification.)

Mr. Thurman: I hand you Government's Exhibit 16 for Identification and ask you to examine it.

Mr. Choisser: May I ask a question on voir dire, if your Honor please?

(Testimony of Arthur R. Beals.)

The Court: Yes.

Mr. Choisser: Do I understand now, Mr. Beals, that the conversation which you relate, and you said you showed Exhibit 15 to Mr. Spriggs on or about September, 1948, it did not take place, you say you were in error on that date?

A. I saw Mr. Spriggs during that period of time.

Q. But you didn't show him this exhibit as you testified to at that time?

A. I cannot say definitely that I did, but I can say definitely that he—that we discussed this particular transcript.

Q. No, that was not what I asked you. Did you show him that in September, '48, or did you [100] not?

A. I can't state definitely that I did.

Q. But you do testify now that you did discuss it and showed it to him in January, '49, is that what I understand? A. Yes, sir.

Mr. Choisser: That is right.

Mr. Thurman: I forgot the last question.

(Whereupon the last question propounded to the witness was read by the reporter.)

Mr. Thruman: See if you can identify that or not?

A. Yes, sir; I do.

Q. And what is the date of it?

A. Dated the 24th day of January, 1949.

Q. And at that time what took place? Never

(Testimony of Arthur R. Beals.)

mind telling us about that thing, but just tell us what took place between you and Mr. Spriggs and whoever else was there?

A. Do I have to limit it to this transaction?

Q. Yes, that is right, that is right.

The Court: That is, to the sale of the Bailey property?

Mr. Thurman: That is right, try and limit it to that.

The Court: Did you have a conversation [101] with him on this date concerning the Bailey property? A. Yes, sir.

Q. Who was present?

A. Mr. Tucker, Mr. Spriggs and myself.

Q. Did you tell Mr. Spriggs that he need not answer any questions in the event he thought they might incriminate him?

A. I don't recall informing him of his—of that matter at that particular time. May I state further, he did not——

The Court (Interrupting): Had you previously informed him of his Constitutional rights?

A. Yes, sir.

Q. When?

A. That was on my first visit to—my first conversation with Mr. Spriggs, when I saw him at his home.

Q. You identified yourself at that time as an Internal Revenue agent? A. Yes, sir.

Q. A Deputy Collector? A. Yes, sir.

The Court: Very well.

(Testimony of Arthur R. Beals.)

Mr. Choisser: May I ask a question?

The Court: Yes.

Mr. Choisser: Was the Bailey property [102] discussed at that time?

A. No, sir.

The Court: When you saw him at his home the first time, did you tell him that you were investigating his return for the year '44?

A. I was investigating——

Q. (Interrupting): No, what you told him, not what you were investigating.

A. Yes, sir; I told him I was investigating several years, including '44.

Q. All right.

A. Could I give his answer to my statement when I informed him of his rights?

The Court: I am not interested, I don't know whether counsel is.

Mr. Thurman: What did he say at that time?

A. Referring to the time I saw him at his home, is that right?

Q. At the time you were talking about what the Court asked you about, what did he say?

A. Well, I told him that his income tax returns were under investigation and I informed him that he had Constitutional rights and I asked him if he wanted me to explain them to him and he said, "No, I am an attorney, I understand all of that." [103]

Q. Then from that time on you had other meetings with him, is that correct?

A. Yes, sir; that is correct.

(Testimony of Arthur R. Beals.)

Q. You didn't reiterate it every time you met him? A. No, I felt it unnecessary.

Q. Now, you testified who was there at the time this was signed? A. Yes, sir.

Q. Was this explained, this document here which is Government's Exhibit 15 for Identification, been explained to Mr. Spriggs? A. Yes.

The Court: It had been explained to him?

A. Oh, yes.

Mr. Thurman: And he signed it, did he?

A. Yes, sir; he did.

Mr. Thurman: I offer it.

The Witness: Signed it under oath.

Mr. Choisser: I object to it, if your Honor please, as being entirely irrelevant, incompetent and immaterial. It is a statement of something, a balance sheet as of December 31st, '42, and has no relevancy to the matter in question on the sale of the Stuart Bailey premises. It does not purport to show the cost price, the sale price or [104] any other matter concerned with the bill of particulars.

The Court: Well, if it does, I can't tell it from this document.

Mr. Thurman: I think I can help the Court and jury here if I can just get the document a second.

The Court: All right, here you are (handing document to Mr. Thurman).

Mr. Thurman: How was the Stuart M. Bailey transaction set forth in here, can you tell the Court?

Mr. Choisser: We will object to that, the exhibit shows for itself.

(Testimony of Arthur R. Beals.)

Mr. Thurman: It could be just a number or something, I think that it could be explained.

The Court: I think that you can—the objection is sustained. I am not going to tell you why.

Mr. Thurman: That is all right, I am not asking you. Is the Stuart M. Bailey deal set forth in this particular exhibit, being Government's Exhibit Number 16?

Mr. Choisser: The same objection, if your Honor please.

The Court: It calls for a conclusion of the [105] witness. The objection is sustained.

Mr. Thurman: Who prepared this statement?

A. I did, sir.

Q. And the statement with respect to the Stuart M. Bailey matter——

Mr. Choisser: Just a minute, if your Honor please, the same objection. Counsel is leading the witness and now he is attempting to put in the question——

The Court (Interrupting): No, he said, "Who prepared it."

Mr. Choisser: No.

The Court: And the witness said he prepared it and that question and answer is proper and counsel has not finished his next question.

Mr. Thurman: And is the Stuart M. Bailey property, did you set it forth on this instrument which is Government's Exhibit 16 for Identification?

Mr. Choisser: Just a minute. May we still

(Testimony of Arthur R. Beals.)

interpose the same objection to the same question?

The Court: The objection is sustained.

Mr. Thurman: And was this exhibit, being Government's Exhibit Number 16 for Identification, with the figures on that and the descriptions here taken from Government's Exhibit Number 15 [106] for Identification?

A. The Government's Exhibit 15 there supports this statement——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, we object to that as calling for a conclusion of the witness and not responsive and I request that the answer be stricken.

The Court: The answer may be stricken and the jury instructed to disregard it.

Mr. Thurman: In other words, you made up this Government's——

The Court (Interrupting): Now, you are leading the witness and counsel objected on that ground, so you might just as well stop it now.

Mr. Thurman: From what did you prepare this Government's Exhibit 16?

Mr. Choisser: If your Honor please, we will object to this as having been asked and answered; already been gone into by counsel.

Mr. Thurman: You objected to it.

The Court: Overruled.

(The question was read by the reporter.)

The Witness: I prepared it from all the information available, but as to that——

(Testimony of Arthur R. Beals.)

The Court (Interrupting): No. [107]

Mr. Choisser: No.

The Court: When you start out putting "but" in it, then you start arguing.

The Witness: As to that piece of property——

The Court: No.

Mr. Choisser: Just a minute, we submit that the question has been asked and answered.

The Court: Well, he has prepared it from all the information available. I don't know what he means, "All the information available."

The Witness: May I state further on that?

The Court: Well, not if you are going to start an explanation or argue concerning that particular piece of property. The question called for the material that you used to prepare that, what information was available?

A. An account from the records of Mr. Spriggs.

Q. That you made?

A. I transcribed.

Q. Did you show it to him? A. Yes, sir.

Mr. Thurman: And this Exhibit Number 16, did he concur in the amounts set forth in there with respect to the Stuart M. Bailey property?

Mr. Choisser: I object to that, if your [108] Honor please, calling for a conclusion of the witness.

The Court: Objection sustained. There is no evidence in the record that Exhibit 16 has anything to do with the Stuart M. Bailey property.

(Testimony of Arthur R. Beals.)

Mr. Thurman: Well, I was not permitted to explain one of the sentences in here.

The Court: You haven't asked him the right question yet.

Mr. Thurman: How do you designate—by what manner or means, how do you describe this property, this Bailey property?

The Court: It assumes a fact not in evidence, or is it described there?

Mr. Thurman: It is described.

The Court: Counsel will testify?

Mr. Thurman: No, I don't want to testify. I don't know how I can ask him the question any different than I have, your Honor.

The Court: Well, they are all objectionable up to now.

Mr. Thurman: Read the last question.

The Court: I am sorry, counsel, all I can do is call the shots as they come.

Mr. Thurman: Your Honor, that is what [109] I understood. Read the last question.

(Thereupon the last question was read by the reporter.)

The Court: In Exhibit 16.

Mr. Thurman: In Exhibit 16 for Identification.

Mr. Choisser: I object to that, if your Honor please.

The Court: On what ground?

Mr. Choisser: Assuming facts not in evidence.

(Testimony of Arthur R. Beals.)

There is nothing in there to indicate that whatsoever.

The Court: Sustained.

Mr. Thurman: What do you have reference to by "1029 Fifth Avenue," what does that relate to?

Mr. Choisser: I object to that as calling for a conclusion of the witness.

The Court: May I see the document?

Mr. Thurman: The document he made up himself (handing the document to the Court).

The Court: Oh, that objection is sustained—oh, wait a minute—the objection is sustained. There is no foundation laid.

Mr. Thurman: Was that item with respect to the Stuart M. Bailey property discussed with [110] the defendant prior to the time that he signed this exhibit?

Mr. Choisser: Just a minute, if your Honor please, we will object to that as something not in evidence. There is no item in there that the Stuart M. Bailey property is in there.

The Court: It says "1029 Fifth Avenue house." Let me hear the last question.

(The last question propounded to the witness was read by the reporter.)

The Court: The objection is sustained.

Mr. Thurman: Did you ever discuss with this defendant Mr. Spriggs this property designated as 1029 Fifth Avenue? A. Yes.

Mr. Choisser: I object to it as being immaterial, if your Honor please.

(Testimony of Arthur R. Beals.)

The Court: Overruled.

The Witness: Yes.

The Court: When?

A. Prior to the signing of this statement here on January 24th.

Mr. Thurman: And was the amount set forth there as the cost of the property to Mr. Spriggs discussed with him? A. Yes. [111]

Q. And did he approve the figure?

Mr. Choisser: Just a minute, if your Honor please, that question is objectionable, calling for a conclusion of the witness. The exhibit states for itself what it is. Let's have what was said or done with the exhibit.

The Court: Well, that is a good way to prove it, to find out what was said. Up to now you have been just asking what has been in this witness' mind. You can't tie that onto the defendant.

Mr. Thurman: No, I don't mean to try to, your Honor. What was said at that time and place concerning this Stuart M. Bailey property?

The Court: That is the same objection counsel has been making to that question repeatedly. Was anything said concerning the property described here as 1029 Fifth Avenue?

A. Yes, sir.

Q. What was said by you to the defendant and the defendant to you?

A. This piece of property came under discussion——

Mr. Choisser (Interrupting): Just a minute,

(Testimony of Arthur R. Beals.)

if your Honor, we will submit that is not responsive. [112]

The Court: That is not responsive.

Mr. Choisser: I ask that it be stricken.

The Court: What was said about this 1029 Fifth Avenue property at the time he signed this statement on January 24th, '48?

A. May I see the statement?

The Court: Surely (handing document to the witness).

A. As of December 31st, '42, the depreciated basis——

The Court (Intrrupting): No, who said this?

A. I said it, I did.

Q. You said it to him?

A. I stated the depreciated basis as of December 31st, '42.

Q. To whom?

A. In his presence, to him, yes, sir; to him, this piece of property at 1029 Fifth Avenue, one and the same piece of property as was sold to——

Mr. Choisser (Interrupting): Just a minute, we submit, your Honor, that that is not responsive. He said some words were said and then he explained that is the same property. I know he didn't say that to Mr. Spriggs. We object to [113] it as not being responsive.

The Court: Mr. Witness, what you are allowed to testify to now is what you said to him and what he said to you.

A. All right.

(Testimony of Arthur R. Beals.)

The Court: Not something else.

Mr. Thurman: In substance.

The Court: Well, in substance, the best you can remember.

A. In substance.

The Court: None as here now know that 1029 Fifth Avenue, we don't know where it is or what it is.

A. I think I can——

Q. (Interrupting): And there isn't any evidence in the record to show from Mr. Bailey's testimony that the property there had any street address or anything, so we don't know what it is.

A. In substance, Mr. Spriggs identified the property sold——

Mr. Choisser: We will object to that, if your Honor please. He is still relating a version if it, not what was said and done. We object to it for that reason.

The Court: Yes, that is right. What he said. Can't you say, "Well he said to me" and, [114] "I said to him," and "He said to me," and "I said to him"?

A. I asked Mr. Spriggs the address of the property sold to Stuart M. Bailey to which he replied that it was 1029 Fifth Avenue, Safford, Arizona.

Mr. Thruman: Then after that was said, what else took place, what was the next thing that was said, in substance, at that time and place?

A. He replied that that was one and the same piece of property.

(Testimony of Arthur R. Beals.)

Q. All right.

A. And then the question as to his cost of that particular piece of property.

Q. That was discussed at that time?

A. It was discussed at that time.

Q. What did you say to him about this cost and what did he say to you at that time and place?

A. I asked him if there were any costs to this property other than were shown in this document which I earlier referred to as the 1029 Fifth Avenue property, if there were any additional costs, and to which he replied they were all in that reflected in that account.

Q. Are you referring to Government's 15 for Identification now? [115]

A. Yes, sir; I am; yes, sir; I am.

The Court: You had that before you at the time? A. Yes.

Q. And did he? A. Yes, sir.

Q. Did he examine it? A. Yes, sir.

Q. Go ahead, what was said, now?

A. Then the matter of the depreciated basis on this particular piece of property as of December 31st, '42, was discussed, and I had prepared a statement——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, we are far afield now from the instructions of the Court. We would like to know what was said and done, not what the witness——

The Court (Interupting): When you asked him how much it cost, what did he say?

(Testimony of Arthur R. Beals.)

A. He agreed to the——

Mr. Choisser (Interrupting): Just a minute.

The Court: What did he say; did he say something?

A. He agreed to the figures that I had set [116] forth in this document.

The Court: Which document?

Mr. Choisser: I ask that that be stricken and the jury instructed to disregard.

The Court: Right, those figures are right——

A. (Interrupting): He said he had nothing more to add to these figures as to the cost.

Q. What figures do you have on this document right there?

A. Two thousand——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, I submit that that is not responsive. We are still far afield from what your Honor asked, even.

The Court: Well, in the meantime, counsel for the Government has handed the witness another document from which he appears to be reading, and when he said he had nothing to add to that cost, what was he referring to?

The Witness: He was referring to this cost as indicated in this document.

The Court: Fifteen?

A. Document 15, setting forth the cost of 1029 Fifth Avenue property as $2,063.30 as the original cost. Now, that——

Mr. Choisser (Interrupting): Just a [117] min-

(Testimony of Arthur R. Beals.)

ute, if your Honor please, that is not responsive to the question.

The Court: Yes, yes.

Mr. Choisser: May I have that last figure Mr. Reporter.

The Reporter: $2,063.30.

Mr. Thurman: I offer in evidence Government's Exhibit 15 for Identification and Government's Exhibit 16 for Identification.

The Court: Limited to that one item?

Mr. Thurman: Yes, your Honor.

Mr. Choisser: I object to that, if your Honor please, first, as to Exhibit 16, which is as of '42, two years before the sale of the property which makes it irrelevant, incompetent and immaterial. The property is not described as any particular property and I don't know where the particular property is, in what State or what County. It is two years before it was sold, by the Government's bill of particulars. We submit it is highly irrelevant, incompetent and immaterial, this worksheet as of '42—supposedly——

The Court (Interrupting): Let me see that document.

Mr. Choisser: (Handing document to the Court) This, if your Honor please, has no [118] date on it whatsoever.

The Court: Well, I think that as far as the two documents are concerned, counsel, that they go far afield. The particular item involved here which you are attempting to prove at this time, to wit: the

(Testimony of Arthur R. Beals.)

cost to the defendant of the property in Safford, Arizona, sold to Bailey, and the amount of the sale, I do not believe that I can, in justice or fairness to the defendant, permit this document in evidence because there are so many other things in that, that that would be confusing and might tend to prejudice or cause the defendant wrongfully——

Mr. Thurman (Interrupting): You can hold that decision in abeyance until the end of the case, because there are other items in there I will have to put in.

The Court: Very well. All right, the objection will be sustained at this time.

Mr. Thurman: That is all at this time from this witness.

The Court: Cross-examine.

Mr. Choisser: No cross-examination at this time.

The Court: The witness is excused. You live in Mesa? [119]

The Witness: Yes, sir.

The Court: Could he be permanently excused?

Mr. Thurman: Oh, no, he will have to be here all through this trial. We will have to spot him in wherever we can. The foundation has not been laid for a lot of his testimony, your Honor.

The Court: All right.

Mr. Thurman: A lot of it.

The Court: All right this witness is not excused. All right. [120]

* * *

JAMES A. STRUCKMEYER

was called as a witness on behalf of the Government and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thurman:

Q. Please state your name.

A. James A. Struckmeyer.

Q. Mr. Struckmeyer, where do you live?

A. 1516 East Almeria in Phoenix.

Q. What is your profession—you are a lawyer here? A. Lawyer.

Q. And you are acquainted with the defendant, are you, Mr. Spriggs? A. Yes.

Q. At any time was he ever associated in your law offices or that of your father's, Judge Struckmeyer's office? A. Yes. [185]

Q. And about what period of time was that?

A. I believe it was in the fall of '43 until sometime in '45 or '6.

Q. Practically a span of three years?

A. Two or three years, yes.

Q. And during that period of time you associated with him frequently, did you not?

A. Yes, professionally and socially.

Q. And did you ever have any conversation during that period of time with this defendant with respect to the payment of income tax returns or income taxes to the Federal Government?

A. Yes, I did.

Q. And can you tell us about when the conversations took place, if there were more than one?

(Testimony of James A. Struckmeyer.)

A. I would say there were several. Mr. Spriggs and I went out together. There were several in the office. I'd say about six to a dozen times.

Q. And practically over what period of time?

A. During the period of time that he was in our office and, perhaps, for three or four months after that.

Q. And can you tell us at this time in substance what the conversation was, what it [186] consisted of?

Mr. Choisser: Your Honor, please, we will object to that as being irrelevant, incompetent, and immaterial. There is no materiality of these conversations shown, don't know what it purports to be, what it purports to prove; no proper foundation laid for this.

The Court: Will counsel approach the bench?

(Whereupon Court and counsel confer at the bench outside of the hearing of the jury, as follows:)

The Court: What do you expect to prove?

Mr. Thurman: I expect to prove assertions made by the defendant to Mr. Struckmeyer that anybody would be a damned fool to pay income tax returns, in substance, and just to show intent, the modus operandi.

Mr. Choisser: The proper foundation has not been laid, does not show whether it is his income tax generally, specifically or any other reason; does not show it was ever carried out; does not tend to

(Testimony of James A. Struckmeyer.)

prove or disprove anything in this indictment, if your Honor please.

The Court: Of course, one of the essential elements of the indictment is wilfullness, which must be proved separately. [187]

Mr. Choisser: There is no proper foundation laid in this or any support of the main allegations of the indictment to show that he did do it.

Mr. Thurman: We have it in the record——

The Court (Interrupting): I think it is admissible.

Mr. Choisser: One or two items in here they allege that certain income was due and they haven't met all of that. If he didn't owe anything, this conversation would not be material if, in truth and in fact, he didn't owe anything.

The Court: I know, you don't have to prove first whether or not he did and then prove the other. In other words, you don't have to either prove it that way or decide it that way.

Mr. Choisser: If he owed income tax, maybe the man wasn't working and didn't have it.

The Court: Well, I said yesterday what the Supreme Court said. The objection is overruled.

(The following proceedings resumed within the hearing of the jury:)

Mr. Thurman: Please read the last question.

(Whereupon the last question propounded to the witness was read by the reporter.)

(Testimony of James A. Struckmeyer.)

The Witness: Generally——

Mr. Choisser (Interrupting): Now, if your [188] Honor please, just a minute; it is not responsive to the question. The question was, what was said?

Mr. Thurman: In substance.

The Court: Yes. I don't know, maybe they said "Generally." Go ahead.

A. The conversation concerned my payment of an income tax and Mr. Spriggs' payment of an income tax. That was the substance of that without repeating the exact conversations. The substance was that I was silly for paying an income tax myself, that Mr. Spriggs did not pay an income tax and that there was no reason I should pay an income tax if I handled my affairs or my returns correctly. I can locate two of the conversations. One occurred in the office that I remember of in the presence of Mrs. Ross, our secretary; another in the presence of Mr. Harold Whitney, a lawyer here on the street, and I believe once at the New Yorker Cafe.

Mr. Thurman: Was anything else said in substance concerning that subject, Mr. Struckmeyer, that you remember of?

A. No, I'd say the substance of all those conversations was that I was a damned fool to pay a tax and that Mr. Spriggs didn't pay a tax [189] and there was no reason I should, as I say.

Mr. Thurman: You may cross-examine.

(Testimony of James A. Struckmeyer.)

Cross-Examination

By Mr. Choisser:

Q. Was that from a comparison of your relative incomes, Mr. Struckmeyer, do you know?

A. No, it was not so far as I know. I don't know what was in Mr. Spriggs' mind as to that. We were—I think our incomes were about equal then, perhaps I was making a little bit more than he was.

Q. And it concerned the correct method of making a return?

A. The general import, Mr. Choisser, was, that if you did it right you didn't have to pay any income tax.

Q. The conversation was that no matter what your income was, that that would still hold true?

A. That was about the gist of it; yes, sir.

Q. Or, no matter what you made, he told you that no matter what you made, if your report in a certain way was correctly handled, he said there would be no tax due?

A. No, he didn't go that far. As stated, it [190] was mostly confined to me. One time when I was present he made the same statement to Mr. Whitney. Now, I don't know whether he limited it to income groups or not.

Q. It concerned your method of figuring your return?

A. The method of reporting the return, sir.

Q. Yes, the method of reporting the returns?

A. Yes, sir.

Mr. Choisser: That is all.

Mr. Thurman: That is all; thank you, Mr. Struckmeyer.

(The witness was excused.)

Mr. Thurman: Mrs. Ross.

MARJORIE ROSS

was called as a witness on behalf of the Government and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thurman:

Q. Please state your name.

A. Marjorie Ross.

Q. Miss or Mrs.? A. Mrs. [191]

Q. And you live here in Phoenix, Arizona?

A. Yes, I do.

Q. And what has been your profession or business in the last several years?

A. I have been employed by Struckmeyer and Struckmeyer.

Q. In what capacity? A. Stenographer.

Q. How long were you employed as clerk for Struckmeyer and Struckmeyer here in Phoenix?

A. Commencing in '44, September of '44.

Q. And you are still employed there?

A. Yes, I am.

Q. And during this period of employment did you become acquainted with the defendant in this case, Mr. Spriggs?

(Testimony of Marjorie Ross.)

A. Yes, he was an associate in the office.

Q. He was an associate in the office?

A. Yes.

Q. You did work for him, did you, the same as you did for other lawyers?

A. Yes, I did.

Q. And were you ever present during that period of time—what period of time was he there?

A. I believe Mr. Spriggs was there when I commenced work, and he left, I believe, the last [192] of '45 or the early part of '46.

Q. During that period of time were you ever present when Mr. Spriggs was discussing with Mr. James Struckmeyer the payment of income taxes to the Federal Government?

A. Yes, I have heard Mr. Spriggs discuss the matter.

Q. On those occasions who were present, if you can remember?

A. I can't remember exactly who all might have been there, Mr. Thurman, but Mr. Struckmeyer was there and I was there, I know that at times there have been other people there, but who they were I couldn't say exactly.

Q. And where did these conversations take place? A. In the office.

Q. In the office. Can you tell the Court and jury in substance what those conversations were between the parties there?

A. Well, in discussing income tax, the remarks were made about the payment of income tax, that

(Testimony of Marjorie Ross.)

they could not be paid or did not have to be paid if you made your income tax return in the correct manner, that Mr. Spriggs knew how to make his income tax rerturn or bocks up so he [193] didn't have to pay it.

The Court: Do you make income tax returns?

A. Yes, sir; I do.

Q. Do you try to take the deductions?

A. Me?

Q. Yes.

A. I don't make my own tax returns.

Q. But you do take deductions?

A. I presume I do.

Q. You do everything you can to reduce your tax?

A. I don't have anything to do with my own tax at all.

Q. Oh, you don't? A. No, I don't.

Q. Who makes these?

A. I have them made by a man that prepares the tax returns.

Mr. Thurman: I have no further questions.

Cross-Examination

By Mr. Choisser:

Q. Mrs. Ross, this conversation concerning income tax, did it relate to salaries or to the operation of real estate or stocks and bonds, or what? [194]

A. I presume it related to everything.

The Court: The answer may be stricken.

(Testimony of Marjorie Ross.)

Mr. Choisser: The different classes of returns was not discussed?

A. I don't know whether it was discussed.

Q. I mean, in your presence, did you hear it?

A. I don't understand what you mean.

Q. In other words, the income tax returns that you are talking about and Mr. Spriggs was talking about, did it concern salaries or the operation of real estate, or what?

A. I thought that it concerned everything.

The Court: It was just a general discussion, is that it?

A. Yes.

Mr. Choisser: He said that if you made it properly you may not have to pay income tax?

A. What was that?

Q. I say, you say he made the statement that if they were made properly you may not have to pay income tax?

A. Not exactly that way, Mr. Choisser, no.

Q. How did he say it?

A. To the best of my knowledge, as I can remember, the implication was—— [195]

The Court: No.

Mr. Choisser: No, not what the implication was.

The Court: You have been around a law office too long.

A. Well, maybe that is why I am frightened.

Mr. Choisser: Well, in other words, there was nothing said as to whether it was real estate, salaries or income from stocks and bonds or what,

(Testimony of Marjorie Ross.)

was there; no conversation concerning those items?

A. Yes, it concerned everything, Mr. Choisser.

Q. Did it concern stocks and bonds?

The Court: Did he mention stocks and bonds?

A. No, not that I recall.

Q. Did he mention if you invested your money in oil wells you can take a depletion allowance of 27½ per cent?

A. He said he knew how to take care of those things, yes.

Mr. Choisser: That is all.

Mr. Thurman: That is all.

(The witness was excused.)

Mr. Thurman: May we have the morning recess now, your Honor?

The Court: All right. We will have the [196] morning recess and remember the admonition.

(A short recess was thereupon taken.)

After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows: [197]

* * *

ARTHUR R. BEALS

was recalled as a witness on behalf of the Government, and having been heretofore duly sworn testified further as follows:

Direct Examination
(Resumed)

By Mr. Thurman:

Q. You are the same Mr. Beals that was on the witness stand yesterday? A. Yes, sir.

Q. And you testified yesterday that you had compiled Government's Exhibit Number 16 [200] for identification, is that correct—I will let you look at it (handing document to witness).

A. Yes, sir; I did.

Q. And I believe you stated that you compiled that from the books of Mr. Spriggs, is that correct?

A. Not entirely, all the information here is not from the books of Mr. Spriggs.

Q. Now, with reference to the McBride property, the property that Mr. McBride testified to yesterday, is that contained in that exhibit?

A. It is.

Q. And how is it designated in there?

A. It is designated as "Safford Office."

Q. And what did you do with respect to that particular piece of property, Mr. Beals, in your investigation?

A. That particular piece of property was considered as——

Mr. Choisser (Interrupting): Just a minute, if

(Testimony of Arthur R. Beals.)

Mr. Thurman: When and where, and what took place?

A. The transaction was discussed with Mr. Spriggs at least, if not earlier, on October 20th, 1948, when, in the presence of Special Agent Lloyd Tucker, we discussed the cost of that particular property together with other property.

The Court: What do you call this piece of property?

Mr. Thurman: It is the property that Mr. McBride testified as being that office building in Safford.

Mr. Choisser: We make the further objection, if your Honor please, if that is the piece of property, the record shows the title in that property was in Evelyn Lee Spriggs and not in the defendant at all.

Mr. Thurman: I might as well call the Court's attention right now to find out where we stand on that. There is only one income tax return made for that particular year on which there is no reflection of that property under our theory. Even though it might have belonged [204] to the wife, there was a joint income tax return for both of them and was signed by the defendant. Of course, they are in evidence and speak for themselves.

The Court: A joint return?

Mr. Thurman: Yes, sir; according to our position. I don't know whether we are going to be able to prove it.

The Court: It does not seem to indicate that on the face of the return. That is '46, '47——

(Testimony of Arthur R. Beals.)

Mr. Thurman: There was no return at all filed for the wife—no, they are all by Claude E. Spriggs.

The Court: It doesn't indicate to be joint returns.

Mr. Thurman: I was in error on that. As I understand it, he took exemptions for both of them.

The Court: He can still do that and she can still file a return and owe a tax, too. I don't know. In view of your stipulation, that property was her separate property?

Mr. Thurman: It is already stipulated as to that, your Honor.

The Court: Therefore, any answer to the [205] question you asked would be immaterial.

Mr. Thurman: Well, taking it in the light of only one income tax return here.

The Court: You are prosecuting the defendant here for fraud on his income tax return, nothing to do about Mrs. Spriggs. This was the year——

Mr. Choisser (Interrupting): '46.

Mr. Thurman: We take the position it is a community property state, income to both of them.

The Court: I thought you stated that it was her separate property?

Mr. Thurman: That was, but there was a sale of it under our theory, a profit that was not reported.

The Court: You mean, that if the wife sells her separate property half of it is her husband's? I'd like to see the wife that you can get away with that.

Mr. Thurman: I didn't make any such asser-

(Testimony of Arthur R. Beals.)

tion, nor did I intimate it. I am talking about the income tax return made only by Mr. Spriggs, no notice or no mention made in there of any sale of that property.

The Court: It was his wife's property, you stipulated, it was his wife's property. [206]

Mr. Thurman: Yes.

The Court: Why didn't you indict Mrs. Spriggs?

Mr. Thurman: I don't know. Mr. Beals, in your investigation of this case, did you go into the element of depreciation set forth in the income tax returns of this defendant? A. Yes, sir.

Mr. Choisser: Your Honor please, we will object to that as being irrelevant, incompetent and immaterial, no foundation for this. We don't know what property he is talking about; if he is just talking about joint income.

The Court: That is obviously a preliminary question and your objection is overruled.

Mr. Thurman: That is all. With respect to the year 1946 concerning the depreciation set forth by the defendant in his income tax return for that year?

A. I can refer to my working papers and testify from them.

Q. Well, you are familiar with this income tax return, are you not, being Government's Exhibit 2 in Evidence? A. I am.

Q. Well, turn to the place where it shows [207] the depreciation. A. Yes (complying).

Q. And did you ever discuss the depreciation

(Testimony of Arthur R. Beals.)

with Mr. Spriggs set forth in that income tax return for the year '46? A. Yes, sir.

Q. And when was that?

A. If not before, on October 20th of '48.

Q. And whereabouts?

A. At the office of the Collector of Internal Revenue.

Q. Who was there at that time, if you remember?

A. Mr. Tucker.

Q. And what was said by you and what was said by Mr. Spriggs at that time with respect to the depreciation as set forth in that exhibit?

Mr. Choisser: I object to that as being immaterial, irrelevant and incompetent, no foundation laid for that. The exhibit is in evidence and it speaks for itself; no basis for the foundation of any such conversation for the introduction of it.

The Court: Overruled.

The Witness: I asked Mr. Spriggs to identify these pieces of property which he had—which [208] appeared for depreciation in this schedule "F" of the return, their being identified on the return only as "Adobe, frame, cement, cement and cement," to which Mr. Spriggs gave me—he identified each of these pieces of property.

Mr. Thurman: How did he identify them at that time?

The Court: What did he say?

A. He said that this piece of property listed as cement, date acquired in '39 for $2500.00, was the Safford office.

(Testimony of Arthur R. Beals.)

Mr. Choisser: Just a minute, we will object to that and ask that it be stricken, if your Honor please. We are still talking about the separate property of Mrs. Spriggs. Now, counsel is going back into something else that the Court has just ruled on.

Mr. Thurman: It is on the income tax return of the defendant.

The Court: The objection is overruled. This was a conversation with the defendant. Go ahead.

The Witness: And the return further shows depreciation claimed——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, the question was, not what [209] this return shows, the question was, what was the conversation with the defendant.

The Court: Did you call his attention to that?

A. Pardon?

Q. Did you call Mr. Spriggs' attention to what you say the return showed?

A. We discussed it in detail, yes, sir.

Q. All right, go ahead and relate the conversations.

The Witness: Well, there are other pieces of property here listed.

The Court: Which "cement" was that, that Safford office?

A. The one listed as acquired in '39.

Q. All right, go ahead, what was the rest of the conversation?

A. Now, the item as listed here at $2500.00——

Mr. Choisser (Interrupting): That is not the

(Testimony of Arthur R. Beals.)

conversation; we object to that as not being responsive.

The Court: I think he is trying to relate the conversation as near as he can. What item are you referring to?

A. The Safford office, the cement property he acquired in '39. [210]

The Court: All right.

A. Relative to the cement property acquired in '39 and listed on the return at $2500.00, I asked Mr. Spriggs the manner in which this property was obtained. He stated that, in substance, that the property had been given to his wife by her father and in asking—I asked him further the value of that property at the time and if he knew the cost. I asked him if he knew the cost of that property to her father. He said that he did, that it was $2,000.00. Then I asked him the reason for listing it at $2500 on the return. He stated that he had purchased equipment that was in the office at the time it was acquired by the father-in-law and that he had acquired equipment at that same time which was left in the office and that that accounted at least for the most part for the difference.

Mr. Thurman: What is the next item in there?

A. Well, there are other items elsewhere.

Q. What are they; let's go on with them.

A. All right. The adobe, acquired in '45——

Mr. Choisser (Interrupting): Just a minute. May I ask which piece of property this is with reference to the bill of particulars, of counsel?

(Testimony of Arthur R. Beals.)

The Court: This is a conversation here [211] that he is having with the defendant. Maybe we will find out. Maybe it is not in the bill of particulars.

A. I would like to locate some notes which I made at the time.

The Court: Of your conversation with Mr. Spriggs? A. Yes, sir.

Q. You have them?

A. They are here some place (the witness procures documents).

Mr. Thurman: Now, we are on the 1946 income tax return, is that correct?

A. Yes, sir.

Q. All right.

A. All right. Mr. Spriggs identified the item listed on the return "adobe" acquired in '45 at a cost of $7,500.00 as the East Jefferson Street property, and he stated further——

The Court (Interrupting): Now, just a moment. This is relative to your item of depreciation in the bill of particulars, Mr. Thurman, Page 2, relating to count 2 of the indictment. It says: "Overstatement of depreciation by the defendant is the result of his having falsely represented the cost of the property [212] located on Henshaw Road, Phoenix, Arizona——." Nothing is said about the Safford office or either with relation to that count or count 3.

Mr. Thurman: Well, your Honor, the bill of par-

(Testimony of Arthur R. Beals.)

ticulars limits it to the Henshaw Road property, that is true.

The Court: And, therefore, I think the evidence concerning the conversation with the defendant on the Safford property is not material and it is ordered stricken and the jury is instructed to disregard it.

Mr. Thurman: I was thinking of other acts.

The Court: When the Government furnishes the defendant a bill of particulars and confined itself to this item of depreciation, I understood that is what all of this testimony went to; that is, an overstatement of the depreciation.

Mr. Thurman: With respect to the Henshaw Road property, are you familiar with that transaction?

The Court: Well, did you have any discussions with him concerning the depreciation on the Henshaw Road Property?

A. Yes, sir.

Q. When and where, and who was present?

A. At this same time. [213]

Q. All right, what was said?

A. He identified the item in the depreciation schedule as cement, 1945, as being the Henshaw Road property, and when I inquired as to the cost which is listed there as $20,000.00, he stated that he didn't have detailed records of that, the cost of that property, but that it cost him at least that much and it was in the process of construction; he had purchased the property and he went into the hole

(Testimony of Arthur R. Beals.)

on that, that he had acquired it for a cost, oh, as I recall, it was $2,750.00, and at the time there were, I think, two rentals on it, two units. One was in condition for renting and the other, I believe, was a garage, I am not just certain as to that, but, at least, this property had been acquired in '45——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, we are far afield in the conversation.

The Court: Is that what he said; are you relating his conversation?

A. I am trying to, sir.

Q. Well, all right.

A. He stated that the property had been acquired in '45 and that through the year '46 he [214] had made various additions to this property, and that as of the end of '46 he felt that he had invested in this property $20,000.00—a total of $20,000.00. I further asked Mr. Spriggs to account for the large investment in property as indicated on this return, noting that earlier returns had——

Mr. Choisser (Interrupting): Just a minute, I don't think——

The Court: Did you say anything to him about it?

A. Yes, sir.

Q. All right, don't say what you noted; say what you said.

A. And I called his attention to it, so I said, I said—I said that the increase in investment—the increase on investment of the depreciable property

(Testimony of Arthur R. Beals.)

that is listed in the depreciation schedule had increased materially from the period of '44 and '45 to this listing of the property on the '46 return, and I also commented to him, or asked him if such was the result of borrowed funds, why not a deduction for interest which would indicate that he was paying interest on these funds with which he had purchased this large amount of rental property. [215] Showing on this '46 return there is a total of 10, 20, 32, 34, 35——

Mr. Choisser (Interrupting): Your Honor please, the witness is again making computation from the exhibit and not relating a conversation.

A. I stated to Mr. Spriggs that the '46 return showed an investment in real property, or depreciable property of approximately $36,000.00 whereas, the earlier returns do not show anything like that amount, and he stated—I asked him to state for me the source of those funds. He said he could not give a specific answer for it, to look at the income tax return, and if he had made that kind of money it would be shown on the income tax returns. Now then, there were later discussions regarding this rental property at that same time as related to subsequent—as relates——

The Court (Interrupting): That is the Henshaw Road property?

A. Yes, sir; relating to the Henshaw Road property at the end of '45—no, at the end of '47—in the '47 return. I asked Mr. Spriggs likewise to identify the items listed in the depreciation sched-

(Testimony of Arthur R. Beals.)

ule on that return and he identified two items on the '47 return. [216] The Court: Let's stay with the Henshaw Road property; that is all we are trying here and that appears about all the Government is interested in from the bill of particulars.

A. Yes. I have two items listed on the '47 return; one acquired in '45, Henshaw, $20,000.00, and another "cement" listed at $20,000.00 and he stated, or he said that both of those items were Henshaw Road property, that the second $20,000.00 item there represented investment, additional investment which he had made in the year '46 making a total of $40,000.00 in the Henshaw Road property at the end of '40——

The Court (Interrupting): 6.

A. '47. This was the '47 return which listed the two items of $20,000.00, making a total of $40,000.00 in the Henshaw Road property as of the end of '47. Now, Mr. Spriggs, toward the end of our discussion and after I had stated to him that at the end of '47 his investments there had increased something like over $60,000.00, I asked him where the funds, or rather, he, through our discussion, he made the statement, well, he says, "You are going to ask me where I got that money?", and I said, "You are right, Mr. Spriggs; where did you get that money?," and he [217] said, "Well, look at my returns; it is all on there," but I searched the return and could not find it.

The Court: Did you say that to him?

A. I did.

(Testimony of Arthur R. Beals.)

Q. This is just the conversation?

A. Yes, sir; yes, sir. I told him that I could not find any income reported on any of his returns which would make such an investment possible without—without having borrowed the funds involved, and he identified to me at the time the specific loans which he had negotiated at the bank and which I have taken into account in my work sheets, and so on, and they were not—they did not satisfy us; they did not make this large investment possible, the funds, even considering the amount which he borrowed at the bank.

The Court: That is what he told you, now?

A. Yes, sir. I told him the amounts which had been borrowed from the bank and the amounts which he had reported on his income tax return did not make—would not supply sufficient funds to have such an investment in the property, so at that—our discussion at that point was ended. He said that he would go back and go over his [218] records, and so on, and see if he could justify that, and at that point I endeavored, as I had endeavored——

Mr. Choisser (Interrupting): Just a minute; I object to that.

The Court: No, just a minute.

Mr. Choisser: I ask that it be stricken.

The Court: Not what you endeavored, just the conversation. If that was the end of the conversation, that was the end of the conversation.

A. May I back up for a moment and tell something additional that was discussed at that time?

(Testimony of Arthur R. Beals.)

The Court: In the conversation?

A. Yes, sir.

Q. If it relates to the Henshaw Road, Phoenix, Arizona, depreciation.

A. Yes, sir. I had asked Mr. Spriggs if he was sure that he had as much as $40,000.00 invested in that property, and he pounded on the desk and said that he most assertedly had and he stated that on the whole he had to pay black market prices for tin, for lumber and for building blocks and everything else that he had in the property and he had at least $40,000.00, to which I questioned Mr. Spriggs further on that [219] and stated to him that I could not see where the funds had come from and his only answer was that he was sure he had put it in there and he was sure it would be reported on the return; that his return would disclose all of the funds with the exception that he related further that he had received from his father-in-law——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, we object to that as not relating to the depreciation and has no bearing on the item shown on the bill of particulars whatsoever.

The Court: Yes, I think it does. Overruled. How much did he receive from his father-in-law?

A. He stated that through the course of the past years he had received from his father-in-law through—by means of this Safford office property which we had taken into account in our schedule——

The Court (Interrupting): That may be stricken. Just your conversation, just what you told him and what he said to you.

(Testimony of Arthur R. Beals.)

A. Relative to the source of funds, Mr. Spriggs stated that—which would have been available for the purchase of this property, he stated that his father-in-law had paid some [220] $8,800.00, or such an amount on the purchase of a farm——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, we are getting back to the subject we have already gone over. Conversations relating to other property has nothing to do with the Henshaw property. Funds coming from some other place, from another party has nothing to do with it.

The Court: It still has to do, according to the witness, where he got the money to make the investment on the unit property which was depreciated.

Mr. Choisser: Where the monies came from would not affect the depreciation.

The Court: Whether or not it came would. Go ahead.

A. He stated that he had not received funds from any sources other than from income and from these two items which he had received from his father-in-law, or that his wife had received from the father-in-law, that those were the only sources of funds that he had; that is, of his own equity in funds. Of course, he had borrowed funds and he related that——

The Court: All right. [221]

A. And he so affirmed it later by a sworn statement.

Mr. Thurman: Made in a sworn statement.

(Testimony of Arthur R. Beals.)

Mr. Choisser: We ask that it be stricken. We are concerned with the conversation.

The Court: It may be stricken.

Mr. Choisser: And the jury instructed to disregard it.

The Court: The jury is instructed to disregard it.

Mr. Thurman: Subsequent to the time you had this conversation which you have related, Mr. Beals, did you again have a conversation with the defendant concerning this matter of depreciation, especially as to the Henshaw property?

A. Yes, I did.

Q. And when was that?

A. January 6th of '49.

Q. And who was there at that time?

A. Mr. Tucker and myself and Mr. Spriggs.

Q. And was any mention made in any conversation at that time the fact that this Henshaw property appeared twice in schedule "F" under the explanation of deductions for depreciation?

A. Yes, we discussed that.

Q. Well, what did you say to him about [222] that and what did he say to you at that time?

A. On the meeting of January 6th—we discussed it on January 6th, then again on January 24th.

Q. Of what year? A. '49.

Q. What was said at that time in substance as near as you can tell now?

(Testimony of Arthur R. Beals.)

A. This piece of property, the Henshaw Road property, I had listed this property——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, again we object to the witness giving what he did and his conclusions. The question is, the conversation.

The Court: Conversation, that is right.

A. I stated to Mr. Spriggs that——

Mr. Thurman (Interrupting): Let the record show that the witness is being handed Government's Exhibit 3 for Identification, which is the '47 income tax return. Now, can you answer the question?

A. On January 24th, we were—I was discussing with Mr. Spriggs, and relative to this Henshaw Road property, and I was again—I think the 24th was the date that he came back in and again asserted that he had at least $40,000.00 [223] invested in that property, the very minimum of $40,000.00, so, I can't tell what I did?

The Court: No, this is the conversation with him, not what you did or what you thought.

A. I asked Mr. Spriggs relative to the dates on which this addition; that is, these additions had been made, these additional investments, to which he gave me a very detailed analysis of the investments in each of these pieces of property.

The Court: That is, the Henshaw property?

A. Yes, sir; each of these various units on the Henshaw Road property, and they totalled about $40,000.00.

(Testimony of Arthur R. Beals.)

Mr. Thurman: Have you got that?

A. He identified these units as Unit 1, 2, 3, 4, up to 13, I believe—yes, I have the worksheet which I prepared from his statements to me.

The Court: Did he see it?

A. Yes, sir.

Q. Your worksheet?

A. It was made in his presence. He observed my —in fact, I stated to him, "Well, now, we are—inasmuch as these various units have been acquired at different times and at different costs; that [224] is, all of these units on the Henshaw Road property which had not been acquired at the same time, so we would have to set it up individually for depreciation," so at that he went through and listed each piece of property in detail for me so I could make and prepare a depreciation schedule. I have before me now my worksheet.

Mr. Thurman: Let me see it.

The Court: That was made in your handwriting?

A. Yes, sir.

Q. Did Mr. Spriggs see it, or did he just see you writing something?

A. Well, I don't know how he could see me writing something without seeing it. That is, it was prepared right there in his presence.

Q. I mean, did you show it to him after you got through? A. Yes, I discussed it with him.

Q. Did you show it to him?

A. Yes, sir.

(Testimony of Arthur R. Beals.)

Mr. Thurman: Mark it.

(Whereupon the document was marked as Government's Exhibit 28 for Identification.)

Mr. Thurman: I offer it in evidence.

The Court: You offer it in evidence? I don't know what it is. [225]

Mr. Thurman: Well, it is just the document he just got through describing. I think the Court should see it first before—— (handing the document to the Court).

The Court: What was the Henshaw property, a bungalow court or motel?

A. On the order of a motel.

Q. All right, now you are relating a conversation with Mr. Spriggs?

A. I stated to Mr. Spriggs that we would have to list this property in detail inasmuch as the different units had been constructed in different years in order to prepare the depreciation schedule, and to that he listed the items, or he related the items to me and I recorded them on this sheet and when—when we had—when we got nearly all of the items listed, he asked, "Well, how much does that account for?" I've forgotten now just the exact amount, but he said, "Well, these last items must have cost the difference." I don't recall; we might have gone back and changed some of the others, but nevertheless, the final apportionment there as between the units with Mr. Spriggs' approval——

Mr. Choisser (Interrupting): Just a minute——

(Testimony of Arthur R. Beals.)

The Court: Is that what he said? [226]

A. Yes, sir; he said that was——

The Court (Interrupting): You put that down on that exhibit there, Number 28, the cost of items?

A. Yes, sir.

The Court: Do you offer that in evidence?

Mr. Thurman: Oh, yes.

The Court: Any objection?

Mr. Choisser: Yes, sir; we do, if your Honor please. We object, the proper foundation has not been laid for this exhibit to be introduced in evidence; irrelevant, incompetent and immaterial.

The Court: Well, I think it has. The witness says he showed it to Mr. Spriggs, that he discussed it and Mr. Spriggs gave him the figures. The objection is overruled. It may be admitted.

(Whereupon the document was received as Government's Exhibit 28 in Evidence.)

Mr. Thurman: Now, with relation to this depreciation matter, Mr. Beals, if I am in error, please correct me, but did you discuss with the defendant at either one of these two meetings how it came about that the Henshaw property was placed twice under Schedule "F"?

The Court: He has already stated that [227] discussion.

The Witness: Yes.

The Court: He has already related it. He said $20,000.00—the additional $20,000.00 was on the previous year's return and the next year he spent $20,-

(Testimony of Arthur R. Beals.)

000.00 more and he had a total of $40,000.00 investment, isn't that your statement?

A. Yes, sir; but, relative to that——

Mr. Choisser (Interrupting): Just a minute, if your Honor please, we object to it as having been asked and answered and gone into.

The Court: The objection is sustained.

Mr. Thurman: Was Mr. Tucker at these conversations at the same time you were?

A. Yes, sir; he was.

Q. Both of them?

A. On the 6th and the 24th, we had a conference there that lasted four days, the 24th, 5th, 6th and 7th.

The Court: We will recess until 2 o'clock. Remember the admonition, gentlemen.

(Whereupon a recess was had at 12 o'clock noon of the same day.) [228]

(At 2:00 o'clock p.m. of said day, the trial was resumed as follows:)

The Court: Proceed. The record will show the defendant is present in person and by counsel, and the jury is present, each one in their place.

Mr. Thurman: The last question, I believe, propounded to the witness, was, "Did Mr. Spriggs shortly prior to these conversations or shortly thereafter sign any statements?"

A. Yes, he did.

Q. (By Mr. Thurman): Have you got them?

(Testimony of Arthur R. Beals.)

A. Yes, I have (handing several documents to counsel).

Q. Are these the ones you have reference to?

A. Yes, sir.

Mr. Thurman: May these be marked, purported statements, the ones signed on the 11th day of February, '49, as Government's Exhibit——

The Clerk: 29 for identification.

Mr. Thurman: And the one purported to be signed on the 26th day of January, '49.

The Clerk: Government's 30 for identification.

Mr. Thurman: And the one purported to have been signed on the 25th day of January, '49.

The Clerk: Government's 31 for identification.

The Court: Have you seen these before, [229] counsel?

Mr. Choisser: I have not, if your Honor please.

The Court: All right, you may take them all back and read them over with your client, if you wish.

Mr. Thurman: And the one purported to have been signed on the 24th day of January, 1949.

The Clerk: Government's 32 for identification.

Q. (By Mr. Thurman): At the time that these particular statements were made and signed did you give the defendant a copy of them?

A. Yes, sir.

The Court: Do you wish to look them over?

Mr. Choisser: No, not any further.

The Court: Very well.

Q. (By Mr. Thurman): Referring to Govern-

(Testimony of Arthur R. Beals.)

ment's Exhibit No. 32 in evidence, dated the 24th day of January, 1949, can you give the Court and the jury the fact situation that led up to the execution of that particular instrument?

The Court: Did you prepare that instrument in the presence of the defendant?

A. Yes, sir.

The Court: Did you show it to him?

A. Yes, sir.

The Court: Did he read it? [230]

A. Yes, sir.

Q. Did he sign it in your presence?

A. Yes, sir, he signed it under oath.

The Court: You administered the oath?

A. No, sir, I didn't.

Mr. Choisser: Did the witness say he prepared it in the presence of the defendant there?

The Court: That is what I understood the witness to say.

A. This is a typewritten——

Mr. Choisser: No, just a minute, if your Honor please. I would like him to answer the question, please. I see it is typewritten, I understand that, Mr. Beals.

A. No, I did not prepare this particular——

The Court: Statement?

A. ——piece of matter.

The Court: Who did?

A. It was typed by a Mrs. Long.

The Court: You mean you dictated it?

(Testimony of Arthur R. Beals.)

A. No, it was prepared from a work sheet which I did prepare.

The Court: I see.

Q. (By Mr. Thurman): And who is Mrs. Long?

A. Mrs. Long is the stenographer and secretary for the local office of the Treasury Intelligence [231] Unit.

Q. And after that was prepared by Mrs. Long what did she do with it, do you know?

A. She delivered it to me.

Q. All right. And then what did you do with it?

A. I submitted it to Mr. Spriggs for——

Q. Where?

A. At Room 204 in the office in the Security Building, office of the Treasury Intelligence Unit.

Q. I see. And did you read that to him or let him read it, or what did you do with it while he was there?

A. I gave it to him, and he read it for himself. In fact, he made a correction or two on it and initialed the same before he signed it.

The Court: On that date, the date it bears?

A. Yes, sir; yes, sir.

Mr. Thurman: I offer Government's Exhibit No. 32 for identification in evidence.

Mr. Choisser: Object to it, if your Honor please, as incompetent, irrelevant and immaterial; no proper foundation having been laid. It has nothing to do with the issue of fact, to wit: The depreciation of our Henshaw Street property.

(Testimony of Arthur R. Beals.)

The Court: Well, I don't know, but that is [232] not the only issue here.

Mr. Choisser: Well, I mean that is what we are——

The Court: Is that what it is offered for?

Mr. Choisser: That was the subject under discussion, if your Honor please, with this witness, what he was allowed to relate his conversations on, the depreciation of our East Henshaw Street property.

The Court: Well, counsel is not limited to having this witness testify to that. Is this offered generally in support of the indictment?

Mr. Thurman: Yes, your Honor, and I am a little afraid I might be in error on the record, and I don't want to do it. Now, was this for the year 1944? Is that the breakdown as a reflection of what happened in '44.

The Court: No, this says 1941.

Mr. Thurman: Well, that goes to the cost of that property, that they attempt to show the capital gain, and certainly they got this property long before he sold it. That goes back to before he sold the property.

Mr. Choisser: That is the reason, if your Honor pleases, we will again renew our objection.

Mr. Thurman: Well, the burden is on the Government to show what he did for it. [233]

The Court: Well, I will withhold a ruling on it a moment, and let's see the rest of your statements and see what they look like.

(Testimony of Arthur R. Beals.)

Mr. Thurman: Will you admit the same as to this other one?

Mr. Choisser: Yes, the same situation.

The Court: In other words, you stipulate that all of those statements were seen by the defendant, read by the defendant, and signed by him on or about the date they bear?

Mr. Choisser: Yes, and that they purport to be what they show.

Mr. Thurman: Just a minute, so we will know what we are getting into the record here, please.

The Court: All right. That is 29, 30, 31. The objection is overruled. They are admitted in evidence.

The Clerk: Does that include 32 also, your Honor?

The Court: 29, 30, 31, and 32.

The Clerk: Government's 29 to 32, inclusive, in evidence.

(Whereupon the documents referred to were received and marked as Government's Exhibits 29 to 32, inclusive, in evidence.)

Mr. Thurman: I now offer in evidence— [234] that is, to reoffer it, your Honor—that is Government's Exhibit No. 16 in evidence, which Mr. Beals testified to yesterday, laid the foundation for, and the Court took it under advisement, I believe.

Mr. Choisser: That being a balance sheet as of December 31st, 1942?

Mr. Thurman: Signed on the 24th day of January, 1949.

(Testimony of Arthur R. Beals.)

The Court: Well, you had offered that yesterday with relation to only one particular piece of property.

Mr. Thurman: Yes, your Honor, that is correct.

The Court: I understand you are offering it now generally as to all counts?

Mr. Thurman: That is generally, yes, sir. This is as to the——

The Court: You were offering that only as to one parcel of property?

Mr. Thurman: That was my understanding of it yesterday, yes, your Honor.

The Court: Are you now offering it for that?

Mr. Thurman: Yes, your Honor.

The Court: Then, the objection is still good.

Mr. Thurman: Well, you didn't sustain the objection yesterday; you took it under advisement.

The Court: Well—— [235]

Mr. Thurman: All right.

The Court: All right.

Mr. Thurman: The same condition and same status now.

The Court: If you offer it generally, it is admissible.

Mr. Thurman: Well, I may later do it, but I want to——

The Court: All right.

Q. (By Mr. Thurman): Mr. Beals, I hand you Government's No. 6 for identification, which is a purported check dated June 22nd, 1942, and I will ask you if you can identify it?

(Testimony of Arthur R. Beals.)

A. Yes, sir, I can.

Q. All right. Now, how do you identify this exhibit, Mr. Beals?

A. That is a check signed by Mr. Spriggs.

The Court: Well, did you have any conversation with Mr. Spriggs about it?

A. Yes, sir.

The Court: When and where, and who was present?

A. Which Mr. Spriggs identified to me as the payment, his payment of his portion of the inventory at the time he went into the Hi-de-Ho partnership with Mr. Brown.

Mr. Thurman: I offer the Government's [236] No. 6 for identification in evidence.

The Court: Admitted.

Mr. Choisser: May I ask one question? Where did you obtain this check, Mr. Beals?

A. It was given to me by Mr. Spriggs.

Q. Given to you to keep in your records, by Mr. Spriggs?

A. It was given to me along with all the other—a big box of loose papers and so on.

Q. You returned the other loose papers to Mr. Spriggs? A. Yes, sir.

Q. And you kept this out? A. Just——

The Court: Well, did you or didn't you?

A. Well, it is out.

The Court: Well, did you keep it out?

A. I don't know——

Q. (By Mr. Choisser): You have had it in

(Testimony of Arthur R. Beals.)

your possession since that time, have you not?

A. Not continuously, no, sir.

Q. Who else had possession of it except yourself?

Mr. Thurman: I think that is immaterial, improper cross-examination, unless it is shown that it has been changed. [237]

Mr. Choisser: We object to it, if your Honor pleases, on the ground that the proper foundation has not been laid for the introduction in evidence of this exhibit.

The Court: Well, do you want to continue your voir dire or are you through with it?

Mr. Choisser: That is all. We are through.

The Court: The objection is now that there is no foundation laid?

Mr. Choisser: That is right, if your Honor please.

The Court: Overruled. Admitted.

The Clerk: Government's 6 in evidence.

(Whereupon the document last referred to was received and marked as Government's Exhibit 6 in evidence.)

Q. (By Mr. Thurman): Mr. Beals, you testified that you made a summary from the records, of the books and records of the defendant, that you testified to that yesterday, with respect to the 1944 income tax return? A. Yes, sir.

Q. And you have been in the courtroom all through the case, have you? A. Yes, sir.

(Testimony of Arthur R. Beals.)

Q. And taking into consideration from [238] your summary and the evidence as to the purchase price paid by the defendant, Spriggs, for the Hi-de-Ho in the sum of $5000, and the inventory in the sum of $491.22, and a profit of $580.86, as shown by the testimony of Mr. Brown, and I believe the partnership income tax return of the $580.86, and the sale price that Mr. Spriggs paid Mr. Brown in the sum of $8,400, can you compute the profit on the Hi-de-Ho deal, if any?

Mr. Choisser: If your Honor pleases, just a minute. Are you through?

The Court: Is that the end of the question?

Mr. Thurman: Yes, your Honor.

Mr. Choisser: We will object to that, if your Honor pleases, as assuming facts not in evidence. It calls for a conclusion of this witness.

The Court: You are asking him to substitute his judgment for the judgment of the jury. The objection is sustained.

Q. (By Mr. Thurman): Mr. Beals, in these conversations that you had with the defendant with respect to the depreciation for the year 1947, have you told us all of the conversations that you had with the defendant concerning that?

A. No. No, sir, I haven't.

Q. What have you left out, if anything? [239]

Mr. Choisser: Wait just a minute, if your Honor pleases. We will object to that as not a proper question; ambiguous; not intelligible. If there was a conversation, let's find out if there was one, lay

(Testimony of Arthur R. Beals.)

the proper foundation, and then what it was.

The Court: Well, he was referring to the conversation to which the witness testified this morning, I take it.

Mr. Thurman: That is what my question purported to convey.

The Court: Objection overruled.

A. During this conference beginning on January 24th, 1949, and continuing through the 25th, 26th, and 27th, I think the series of events and conversations ran something like this: I asked Mr. Spriggs relative to the cost of each of these pieces of property that are listed on these statements which have been admitted in evidence, balance sheets as of the close of the various years Nineteen Forty—well, actually it went back to '41, '2, '3, '4, '5, and '6.

The Court: Excuse me, Mr. Witness. I have been thinking over these net worth statements here that have been admitted. I take it that they are offered here to show that any difference between the [240] net worth on one date and a subsequent date shows the income. I am going to reverse myself and sustain the objection to them. I do not think that that is the way to prove income. It lists this property. It states a person's opinion as to the value of the property. One might well have a house that they pay 5000 for, and two years later in making up a net worth statement they might consider it worth 30,000. That wouldn't be income; it wouldn't be taxable income. I am going to reverse myself. I know that there are decisions to the contrary in

(Testimony of Arthur R. Beals.)

the Appellate Courts, but I do not believe that it is fair or just or proper.

Mr. Thurman: All right, your Honor, and I would like to state for the record——

The Court: The objections to Exhibits 32, 30, 31, and 29 will be sustained.

Mr. Thurman: Your Honor, I don't agree with what the court said the purpose was there for their introduction. The purpose is, and it may be erroneous, but it is to show the cost of the real estate to Mr. Spriggs in the initial instance, and then the sale of it, which shows the difference.

The Court: Well, this wouldn't tend to do that, because, for instance, here there are parcels [241] of property that run through here and they change in value.

Mr. Thurman: They may change. If they went up in value, and he sold them, that would be a capital gain, and that is what we want to show.

The Court: Well, I think the Government can prove an income tax case without trying to take a matter of a financial statement and endeavoring to depend upon some argument in connection with it. If somebody bought something and paid so much, they can prove that; and if they sold it for so much, that can be proved.

Q. (By Mr. Thurman): Going back to the question that was propounded to you, Mr. Beals, with respect to the insertion—I will shorten it up—of the Henshaw property twice in the same income tax re-

(Testimony of Arthur R. Beals.)

turn in the year 1947, did you discuss that in detail with Mr. Spriggs at these meetings?

A. Yes, sir.

Q. And what was said with respect to the reason of putting it in twice, putting the same building in twice, and taking a depreciation twice in the same year on the same building?

The Court: On what year?

Mr. Thurman: '47, your Honor.

The Court: '47. Well, I thought he [242] testified concerning that this morning. You had asked him about '46, and he testified there was 20,000; then in '47 there was 20,000 twice. And did you not say that you had asked him about that and he said that he had spent that additional money?

A. Yes, sir, but he later made additional statements relative to that piece of property.

The Court: Other than what you have heretofore testified concerning?

A. Yes, sir. Yes, sir.

Mr. Choisser: May I ask one question? Do I understand that the same identical piece of property is listed twice in the same 1947 income tax return?

A. No, sir.

Q. That is what counsel said, the same piece of property was listed twice.

A. May I explain that?

The Court: Well, I certainly understood your testimony to that effect this morning, but now go ahead.

(Testimony of Arthur R. Beals.)

A. Well, the same piece of property is listed in two different places, but it is not the same item listed twice. Now, may I explain further on that?

The Court: Well, no, you can only explain [243] what your conversation was with him.

A. All right. I asked Mr. Spriggs relative to explaining the fact——

The Court: Well, there are two items on there called "Cement" each $20,000?

A. Yes, sir. Yes, sir.

The Court: You testified that they both related to the Henshaw Street property?

A. Yes, sir. Yes, sir.

The Court: And 20,000 was spent in '46 or '45, whatever year that was, and 20,000 the next year?

A. Supposedly.

The Court: Well, that is what he told you?

A. Yes. Yes.

The Court: I see. All right.

A. Now, explaining, I asked Mr. Spriggs to explain that, and he said that the $20,000, the second $20,000 item there represented the additional investment which he had made during the year of 1947. Then I asked Mr. Spriggs how he would account for the increase in investment there, as to the source of the funds. He had stated previously that the only source of funds that he had was——

Mr. Choisser: Just a minute, if your Honor please. [244] We are not concerned——

The Court: You went all over that this morning.

The Witness: All right.

(Testimony of Arthur R. Beals.)

Mr. Choisser: ——with what was said previously. We object to that as having been asked and answered thoroughly and gone into on direct examination.

The Court: Yes. The objection is sustained.

Mr. Thurman: You may cross-examine.

Mr. Choisser: May we have a couple of minutes' recess at this time? Maybe we can shorten this if——

The Court: Counsel, you have persuaded me. (To the Jury) Remember the admonition.

(A brief recess was taken.)

The Court: Cross-examine.

Cross-Examination

By Mr. Choisser:

Q. Mr. Beals, this Henshaw Street property that we have been talking about this morning and this afternoon consists of land, real estate, real property? A. Yes, sir.

Q. It consists of improvements and buildings on it? [245]

A. Yes, sir.

Q. It consists of furniture and fixtures and furnishings in those buildings? A. Yes, sir.

Q. It consists of various store equipment and things like that on that property, store fixtures?

A. I think one unit has store fixtures on it.

Mr. Choisser: Yes.

(Testimony of Arthur R. Beals.)

The Court: A barber shop?

A. Yes.

Q. (By Mr. Choisser): Now, anything else that you know of that makes up that item of property, that I haven't asked you about?

A. No, I don't—I didn't actually go into these buildings. I took Mr. Spriggs'——

Q. I see. As far as you know, it consists of those different items of property? A. Yes.

Mr. Choisser: That is all.

Redirect Examination

By Mr. Thurman:

Q. When did you last see the property?

A. Oh, I think it was early 1949.

Q. Did you see the property in 1944?

A. Oh, no. [246]

Q. 1947? A. No.

Q. 1946? A. No.

Q. Do you know what was on that property in any of those years I have mentioned, of your own knowledge? A. No, I do not.

Mr. Thurman: That is all.

Mr. Choisser: That is all.

The Court: Step down. Next witness. Are you through with Mr. Beals now?

Mr. Thurman: I am.

Mr. Choisser: Yes.

Mr. Thurman: Mr. Tucker.

The Court: You can be excused if you wish, or you can stay if you wish.

LLOYD M. TUCKER

of San Diego, California, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thurman:

Q. Please state your name.

A. Lloyd M. Tucker.

The Court: Floyd? [247]

A. Lloyd.

Q. (By Mr. Thurman): And where do you live, Mr. Tucker?

A. San Diego, California.

Q. How long have you been living over there?

A. Since April of 1951.

Q. And prior to April of 1951, where were you located? A. Phoenix, Arizona.

Q. And during the time you were in Phoenix, Arizona, were you employed by the Federal Government? A. Yes, sir.

Q. And in what capacity?

A. As a special agent for the Intelligence Unit of the United States Bureau of Internal Revenue.

The Court: Are you now so employed?

A. Yes, sir.

Q. (By Mr. Thurman): And what are your duties and responsibilities as such officer, Mr. Tucker?

A. Investigation of various matters before the Treasury Department and the investigation of income tax cases.

(Testimony of Lloyd M. Tucker.)

Q. And did you have an occasion as such officer to work on this particular case now before the Court? [248] A. Yes, sir, I did.

Q. And are you acquainted with Mr. Spriggs, the defendant in this case? A. Yes, sir.

Q. And when did you first meet Mr. Spriggs?

A. On October 20th, 1948.

Q. And where did you meet him first?

A. In the office of the Collector of Internal Revenue in the Post Office Building in Phoenix.

Q. And had your investigation been started at that time? A. No, sir.

Q. It had not. When did you next meet him?

A. I met him next on January the 6th, 1949.

Q. Had your investigation been started by that time? A. Yes, sir.

Q. And who was there in the office besides yourself and Mr. Spriggs, if anyone?

A. Mr. Beals was present on both of those dates.

Q. I see. And when did you meet him again, if you did?

A. I met him next on January 24th, 1949.

Q. And where was that?

A. In the office of the Intelligence Unit [249] at 405 Security Building, Phoenix.

Q. And who was present at that meeting, if you remember? A. Mr. Beals.

Q. And Mr. Spriggs?

A. And Mr. Spriggs.

Q. When did you meet him again, if you did?

A. On January 25th, 1949, at the same place.

(Testimony of Lloyd M. Tucker.)

Q. Same place. And was Mr. Beals present that time? A. Yes, sir.

Q. And when was the next time you met in that office, if you did?

A. On January 26th, 1949.

Q. That all took place here in Phoenix, Arizona?

A. Yes, sir, in the office of the Intelligence Unit in the Security Building.

Q. Was Mr. Beals there on that date? What date was that? What date did you give me?

A. Yes. January 26th.

Q. 26th. Did you meet with him again subsequent to that time?

A. Yes, sir, on January 27th.

Q. Of what year? A. '49.

Q. Same place? [250] A. Yes, sir.

Q. Same persons present? A. Yes, sir.

Q. And did you meet with him again subsequent to that time?

A. Yes, sir, on February 11th, 1949.

Q. And who was there that time, February 11th? A. Mr. Beals.

Q. And Mr. Spriggs and yourself?

A. And Mr. Spriggs.

Q. Did you meet with him after February 11th?

A. No, sir.

Q. Now, going back to the first time that you met Mr. Spriggs in the office of the Internal Revenue—or in the Security Building, Phoenix, Ari-

(Testimony of Lloyd M. Tucker.)

zona, did you have any conversation with him concerning the facts in this case?

A. The first time I met him, sir, was in the Collector's Office.

Q. All right. I said the first time you met him in the Security Building.

A. I am sorry.

Q. That is all right.

A. Yes, sir, I did.

Q. And what date was that again?

A. That was January 24th, 1949. [251]

Q. And you said at that time your investigation had started? Is that correct? A. Yes, sir.

Q. Is that the first time you had met him after your investigation had started?

A. No, sir, I met him on January 6th, 1949, at the Collector's Office.

Q. When did you start your investigation?

A. On October 20th, '48.

Q. Oh. And what conversation did you have with him on October 6th?

Mr. Choisser: Just a minute, if your Honor pleases. For the record, may we interpose the objection that there has been no showing of any crime having been committed, no connection with the defendant therewith, and therefore any statement or admission or whatever he might have said is not admissible at this time. There has been no corpus delicti proved, there has been no connection of the defendant with it, therefore, his statements are inadmissible at this time until that is shown.

(Testimony of Lloyd M. Tucker.)

The Court: Overruled.

Mr. Thurman: Please reread the question.

(The last question was read.)

Q. (By Mr. Thurman): If any. [252]

A. The date was October 20th. I had none on October 6th.

Q. What is that?

A. I met him first on October 20th, 1948.

Q. Did you have any conversation with him then? A. Yes, sir, I did.

Q. About this case? A. Yes, sir.

Q. All right, what was it?

A. I asked him if——

Q. In substance, of course?

A. In substance. I asked him if the Henshaw Road property as shown on his return in the amount of $40,000 was his correct cost basis for that property.

Q. And what year was that shown in, what taxable year?

A. That was shown on the return which he filed for the calendar year of 1947.

Q. All right, proceed.

A. Mr. Spriggs stated that the $40,000 valuation which he had placed on that property was the correct cost.

The Court: Wasn't?

A. Was.

The Court: Was. [253]

(Testimony of Lloyd M. Tucker.)

A. Was the correct cost price on that property to him.

Q. (By Mr. Thurman): What did you say, if anything?

A. I stated that a $40,000 investment in that property over the years of 1945, '6, and '7 was not commensurate with the income tax returns which he had filed, and I asked him again if that were the correct cost basis for that property. He stated that it was. We met that day for approximately six or seven hours. On that same day, after discussing this matter with him further, he stated, "You fellows have me charged with a lot of income, and I don't think I can explain it. Maybe I don't have $40,000 invested in the Henshaw Road property." I asked him where he could have obtained $40,000 to put into the Henshaw Road property, and he stated that all of the money which he had earned, received, was reflected on his income tax return. I asked him what the sources of his earnings were. He stated that he was a practicing attorney, he made money from his law practice, and he had made money from the sale of real estate. I stated that there were no sales of real estate or any real property or sales of capital assets shown on the income tax returns which he had filed for those years. He stated [254] that it wasn't necessary for him to report sales of real estate. I stated that the reporting of capital gains with particular reference to real estate was an elementary part of the income tax regulations. He stated that he had

(Testimony of Lloyd M. Tucker.)

prepared hundreds of income tax returns for clients and that he well knew that they need not be reported. On that date I told him that we would confer with him later, and I asked him to consult all of his records, memoranda, books, checks, invoices, anything he had in his possession which would enable him to substantiate the $40,000 investment in the Henshaw Road property.

Q. And that was the substance of your conversation on this meeting in the Collector's Office?

A. Yes, sir.

Q. Now, were any papers signed at that time?

A. No, sir.

Q. When did you meet with him next then?

A. On January 6th, 1949.

Q. And where did that take place?

A. In the Collector's Office in Phoenix.

Q. And who was there at that meeting?

A. Mr. Beals and Mr. Spriggs.

Q. And can you tell us the substance of any conversations that you had with the defendant in the [255] presence of Mr. Beals with reference to this particular case?

A. Yes, sir. I asked Mr. Spriggs if he had consulted any available records and if he had refreshed his memory with respect to the cost of the Henshaw Road property, and he stated that he and his wife had both discussed it and they had spent many hours reviewing all of the records and memoranda which he had available with respect to the cost of that property. He stated that, "I know now that

(Testimony of Lloyd M. Tucker.)

I couldn't have less than $40,000 invested in that property." I asked Mr. Spriggs if he would be willing at that time to give a voluntary sworn statement to me with respect to the cost which he stated he had in that property.

Q. And did he make—well, what happened? Go ahead. Is that all the conversation that day or not? Pardon me.

A. Yes. He stated that he was willing to give that statement, and I typed it myself there in the Collector's office.

Q. Where did you type that?

A. In the Collector's office.

Q. Was he there at that time?

A. Yes, he was there, and Mr. Beals was there.

Q. You say you typed it yourself. Have you got [256] that statement?

A. Yes sir (handing a document to counsel).

Mr. Thurman: Please mark this purported—he called it a statement. I notice it says, "Affidavit."

The Court: Statement.

Mr. Thurman: Purported affidavit.

The Court: All right, 33.

The Clerk: Government's 33 for identification.

Q. (By Mr. Thurman): And did Mr. Spriggs sign this in your presence? A. Yes, sir.

Q. Did you administer the oath?

A. Yes, sir.

Mr. Thurman: The Government offers in evidence its Exhibit No. 33 for identification.

Mr. Choisser: If your Honor please, we object

(Testimony of Lloyd M. Tucker.)

to this as not being competent to substantiate any of the items in the bill of particulars. There are other items which have heretofore been excluded in the exhibit, and it does not tend to prove or disprove any of the issues set forth in the bill of particulars.

The Court: I think it is admissible. The objection is overruled. [257]

The Clerk: Government's 33 in evidence.

(Whereupon the document last referred to was received and marked as Government's Exhibit 33 in evidence.)

Mr. Choisser: I would like to point out, your Honor, that it only concerns the purchase of two lots. It doesn't cover anything else in this Henshaw Street property.

The Court: Well, the purchase of two lots and the amount of money spent for improvements. There is another parcel or two involved there.

Mr. Choisser: Which have not been in evidence, haven't been testified about.

The Court: Well, there has been some testimony concerning them.

Mr. Thurman: Did you mark this?

The Court: 33 in evidence.

The Clerk: Yes. 33 in evidence.

Mr. Thurman: Yes. That is right.

Q. All right, subsequent to the time you received this affidavit in evidence here, Government's

(Testimony of Lloyd M. Tucker.)

33 in evidence, what took place with respect to matters in this case that you were investigating?

The Court: Well, that is a pretty shotgun question.

Mr. Thurman: Well, I don't want to lead [258] him, your Honor.

Q. What happened next? When did you see the defendant——

The Court: What happened next?

Mr. Thurman: I will withdraw the question.

Q. Did you meet Mr. Spriggs again subsequent to the 6th day of January, 1949?

A. Yes, sir, I did. I next met him on October 24th in the office of the Intelligence Unit in Phoenix.

The Court: That statement is dated January 6th?

Mr. Thurman: The 6th day of January, yes. I am not sure about——

The Court: You asked him if he met him subsequent to that. Now he says he met him October 24th, 1948.

Mr. Thurman: Let me be sure what the date is here. What date is that there?

A. That is January 6th. If I stated October 24th, '48, I was in error. I meant January 24th, 1949.

The Court: Oh. Very well.

Q. (By Mr. Thurman): Well, in the last page of this, tell me whether you are sure that is '48 or '49, the date at the bottom there. [259]

(Testimony of Lloyd M. Tucker.)

A. That is January the 6th, 1949.

Q. All right. Now, when did you meet him again subsequent to the 6th day of January, 1949, if you did?

A. Yes, sir, I met him next on January 24th, 1949.

Q. And whereabouts?

A. In the office of the Intelligence Unit, 405 Security Building in Phoenix.

Q. And who was present at that time?

A. Mr. Beals and Mr. Spriggs.

Q. And did you have any conversations with the defendant at that time and place concerning the facts in this case or the issues?

A. Yes, sir, I did.

Q. And can you state in substance what the conversations were?

A. I handed him these Government exhibits which have been marked, these net worth statements——

Q. Which ones are they?

A. I can't recall which ones.

The Court: 29, 30, 31, 32.

A. I handed him only those that would be dated January 24th. I can't recall from memory which, how many I handed him on that date.

Q. (By Mr. Thurman): I hand you Government's [260] Exhibit No. 32 and ask you if that is one of them that you handed Mr. Spriggs at that time? A. Yes, sir.

Q. I hand you Government's No. 16 for identi-

(Testimony of Lloyd M. Tucker.)

fication and ask you if this could be one of them?

The Court: Was it one?

A. Yes, sir.

Q. (By Mr. Thurman): What conversations did you have with the defendant at that time?

A. I handed him these statements and asked him——

The Court: What are those two numbers?

A. 16 and 32.

The Court: Very well.

A. I handed him these exhibits 16 and 32 and asked him if Exhibit 32 showed his correct net worth on December 31st, 1941. He stated that it did. I asked him if he were willing to sign a statement. He stated that he was willing to sign it. I handed him Exhibit 16, which is a balance sheet dated December 31st, 1942, and asked him if all of the items shown on that statement were correct and if it correctly and truly reflected his net worth on December 31st, 1942. He stated that it did. I asked him if he were willing to sign it. He stated that he was. [261]

Q. (By Mr. Thurman): And then what did you do with those records you have there?

A. A copy was given to Mr. Spriggs. This original statement has been in the possession of the Bureau since that time until it was, of course, in your office.

Q. Now, subsequent to the 24th day of January, 1949, is it—— A. Yes, sir.

Q. Did you again see Mr. Spriggs?

(Testimony of Lloyd M. Tucker.)

A. Yes, sir, I met him again on the following day, January 25th, 1949.

Q. And about what time of the day was it, if you remember?

A. I don't remember. I think it was in the morning, but I don't remember.

Q. And where did the meeting take place?

A. In the office of the Intelligence Unit in the Security Building, Phoenix, Arizona.

Q. Who was there?

A. Mr. Beals, Mr. Spriggs, and myself.

Q. And did you on that day and at that time have any conversations with the defendant concerning the facts in this case, Mr. Tucker?

A. Yes, sir, I did.

Q. And can you relate in substance what [262] that conversation or conversations were?

A. I handed him further statements bearing subsequent dates to these—I can't remember which ones I handed him on those days—and asked him if they reflected his correct net worth on the dates indicated on those statements.

Q. If I hand these to you, can you tell us whether or not they are the ones you handed him? I now hand the witness Government's 30 and 31 for identification, and ask you whether or not you handed those particular statements or either of them to the defendant on that date?

A. Yes, I handed Exhibit 31 to the defendant.

Q. And then what took place after handing him that exhibit?

(Testimony of Lloyd M. Tucker.)

A. I asked him if this financial statement dated December the 31st, 1944, truly reflected all of his assets and liabilities on that date. He stated that it did. I asked him if he were willing to sign it. He stated that he was willing.

Q. Did he sign it? A. Yes, sir.

Q. What? A. Yes, sir.

Q. And what was done?

A. He was given a copy of this statement, and the [263] original was retained in my files for some time, and it has since been in the files of the Bureau.

Q. Now, what date have you been talking about now? A. January 25th.

Q. January 25th? A. Yes, sir.

Q. What is the date on that?

A. This exhibit——

Q. Oh, I see. Did you meet with him again subsequent to January 25th?

A. Yes, sir, I met with him on January 26th, 1949, in the office of the Intelligence Unit in Phoenix, Arizona.

Q. And what took place then and there?

A. On that date I handed him Government's Exhibit No. 30 and I asked him if the items contained on that statement were correct, and I asked him if the statement truly reflected his net worth on December 31st, 1945, and he stated that it did, and I asked him if he were willing to sign the statement, and he stated that he was willing.

Q. And did he sign it?

(Testimony of Lloyd M. Tucker.)

A. Yes, sir. [264]

Q. And did you also sign it? A. Yes, sir.

Q. Did Mr. Beals sign it? A. Yes, sir.

Q. Is that true with respect to this other exhibit that you have mentioned? A. Yes, sir.

Q. When was the next time you met him subsequent to January 26th, if you did, Mr. Tucker?

A. On January 26th there is also—on January 26th I also handed him a net worth statement dated December 31st, 1946.

Q. Is that here some place?

A. No, sir, there is no signed statement.

Q. Tell us about what took place there on that date.

Mr. Choisser: Just a minute, if your Honor please.

Mr. Thurman: Conversation, of course.

Mr. Choisser: If there is no signed statement, it wouldn't be material what was related.

The Court: Maybe he had a conversation with the defendant. I don't know.

A. He was handed a net worth statement dated December 31st, 1946, and asked if that truly reflected his net worth on that date. He [265] examined the statement and he stated that his net worth had increased too much, and he wouldn't sign it.

Q. (By Mr. Thurman): Have you got that statement that he didn't sign? Is it in your file?

A. Yes, sir.

Q. Will you produce it?

(Testimony of Lloyd M. Tucker.)

The Court: It wouldn't be admissible anyhow, counsel.

Mr. Thurman: Well, if it wouldn't be admissible, there is no use going into it, then.

The Witness: It is on the table some place, I don't know where.

Q. (By Mr. Thurman): All right. And did that end the conversation that day?

A. No, sir.

Q. All right. Then what conversation did you have subsequent to the time that he refused to sign the statement?

A. I asked Mr. Spriggs if the facts contained on that statement were not correct, and he stated that his increase in net worth was too high, so I questioned him with respect to each of the items contained on that statement, the assets, the depreciable assets, and the liabilities. He agreed that they were all correct with the exception of the cost which he had allocated to [266] the Henshaw Road property. I stated that that was a matter which we had discussed on previous occasions and that up until that time we had been in agreement on it. I asked him why on that date that he stated that the cost which he had allocated to that property was not correct, and he stated—he said, "Well," he says, "I will tell you exactly what happened." He says, "If you ever say that I told you, I will say you are a damn liar." He said, "When I went to file my"—he says, "When I went to file my 1947 income tax return," he said, "I saw that

(Testimony of Lloyd M. Tucker.)

I was going to have to pay some tax, so," he says, "I just added another $10,000 to the cost of it to put me in a no tax bracket."

Q. And then what took place?

A. At that time—that was at 4:45 p.m.—I made a longhand memorandum of Mr. Spriggs' statement.

The Court: Did he sign it?

A. No, sir.

Q. (By Mr. Thurman): Those were just notes that you made at that time? A. Yes, sir.

Q. He said he added 10,000 to it?

A. Yes, sir.

Q. Was anything said about his depreciation on that [267] particular piece of property?

A. Yes, sir, he said that when he—he added the $10,000 to the cost basis so the depreciation which would ordinarily be allowable on a $40,000 cost basis would place him in a no tax bracket.

Q. Subsequent to that date did you have any conversations or meet with the defendant, Mr. Tucker, with respect to the facts or the issues in this case?

A. Yes, sir, I met him again on January 27th, '49.

Q. And who was present and where did you meet him?

A. In the office of the Intelligence Unit in the Security Building in Phoenix.

Q. And who was present at that time?

A. Mr. Beals and Mr. Spriggs and myself.

(Testimony of Lloyd M. Tucker.)

Q. And did you have any conversations then with him?

A. Yes, sir. On that date I took a sworn question and answer statement from Mr. Spriggs.

Q. Have you got it?

A. Yes, sir (handing a document to counsel).

The Court: What date was that, again?

A. January 27th.

Mr. Thurman: Please mark this purported voluntary [268] statement of the defendant as Government's Exhibit——

The Clerk: 34 for identification.

The Court: Have you seen this, Mr. Choisser?

Mr. Choisser: No, sir, I haven't.

The Court: Did you give a copy of it to the defendant?

A. Yes, sir.

Q. (By Mr. Thurman): Did you?

A. Yes, sir. Oh, yes.

Q. While they are looking at it, did he sign it?

A. Yes, sir.

Q. Who administered the oath?

A. I did.

The Court: How long is that—several pages? Do you have any more papers that you are going to produce from this witness?

Mr. Thurman: I don't believe we do.

Q. Do we have any more there, Mr. Tucker?

A. No, sir.

The Court: I think we will take the regular

(Testimony of Lloyd M. Tucker.)

afternoon recess, and counsel can be reading that; and if you have any more documents, you can show them to him during the recess.

Mr. Thurman: I think that is about all, [269] your Honor. Thank you.

The Court: I see. Very well. We will take our regular afternoon recess while counsel reads that statement.

(A brief recess was taken.)

The Court: Let the record show the defendant is present in person and by counsel, and the jury is present, each one in their place. Proceed.

Mr. Thurman: May I have the last question and answer?

The Court: It related to the statement, if he had signed it, the question and answer statement.

Mr. Thurman: Yes.

The Court: Have you examined it, Mr. Choisser?

Mr. Choisser: Yes.

Mr. Thurman: Oh. That is right, yes. The Government offers in evidence Exhibit 34 for identification.

Mr. Choisser: Which is that—that long statement?

The Court: The question and answer statement?

Mr. Thurman: Yes, your Honor.

Mr. Choisser: Object to it on the ground that it is not material, your Honor. It doesn't show the cost price; it doesn't show anything about [270] the depreciation on the Henshaw Street property.

(Testimony of Lloyd M. Tucker.)

The Court: Well, the Henshaw Street property is not the only thing involved here.

Mr. Choisser: As I understand it, that statement has to deal with the Henshaw Street property. In my hurried examination of it, it shows that it concerns the Henshaw Street property.

The Court: Hurried? I took a recess so you wouldn't be hurried.

Mr. Choisser: That was my conception of it, if your Honor pleases. I think that is true, too.

Mr. Thurman: I think the document will speak for itself. I don't think we should argue the question at this time.

Mr. Choisser: That is right.

The Court: Objection overruled. It may be admitted in evidence as Exhibit 34.

The Clerk: Government's Exhibit No. 34 in evidence.

(Whereupon the document last referred to was received and marked as Government's Exhibit No. 34 in evidence.) [271]

Mr. Thurman: Mr. Tucker, do you remember whether or not you met with Mr. Spriggs, the defendant in this case, and Mr. Beals on the 11th day of February, '49? A. Yes, sir; I do.

Q. Where was that?

A. In the office of the Intelligence Unit, Security Building, in Phoenix.

Q. Did you have any conversation with the defendant at that time and place with respect to any facts or issues in this particular law suit?

(Testimony of Lloyd M. Tucker.)

A. Yes, sir; I did, I handed him a net worth statement dated December 31st, '47.

Q. I notice you use the term "net worth" in the statement, the financial statement. Any difference in those two words, or that phrase, rather two phrases? I hand you Government's Exhibit 29, I believe, for identification. Is that the paper you have reference to? A. Yes, sir; that is it.

Q. What is the difference, if any, I don't know?

A. Any balance sheet or financial statement also contains the net worth of an individual, or if it is a corporation, would also disclose that in the form of surplus and capital. If it is a [272] financial statement disclosing the assets and liabilities, the difference between that is what the man is worth, his net worth.

Q. And what period of time was that particular statement represented?

A. This is for the—for his net worth, his financial statement of December 31st, '47.

Q. Where was the information obtained that went into that?

A. From conversations had with Mr. Spriggs and from investigations of independent recourse at banks, escrow records, records furnished by Mr. Spriggs.

Q. Did he see the contents of that exhibit before he signed it? A. Sir—yes.

Q. That is, did he read it? A. Yes.

Q. Did you have any conversation concerning it before he did sign it? A. Yes.

(Testimony of Lloyd M. Tucker.)

Q. What was it, in substance?

A. He had on December—on January 26th, he had stated that he would not sign a statement which was prepared dated December 31st, '46, and he stated on that date if a financial statement [273] would be prepared disclosing his true asset value in the Henshaw Road property, that he would sign the statement.

Q. And was such a statement prepared?

A. Yes, sir.

Q. And is that the statement you have in your hand? A. This is it.

Q. His signature on it? A. Yes, sir.

Q. Did you see him sign it? A. Yes, sir.

Mr. Thurman: We offer Government's Exhibit Number 29 for Identification in evidence.

Mr. Choisser: We urge the same objection, your Honor, to this financial statement, if your Honor please.

The Court: Let's see it.

(The document was handed to the Court.)

The Court: The same ruling, the objection is sustained.

Mr. Thurman: Your Honor, since the testimony of Mr. Tucker, I believe I should again offer Government's Exhibits 16, 31 and 32 for Identification in evidence. I gave them to the Court. I expect the same ruling, your Honor. [274]

Mr. Choisser: To which we offer the same objection.

(Testimony of Lloyd M. Tucker.)

The Court: I shan't disappoint you, the same ruling. The objection is sustained.

Mr. Thurman: I will not be disappointed either way.

The Court: Very well, I know that.

Mr. Thurman: Mr. Tucker, have I forgotten anything?

Mr. Choisser: You may tell him, Mr. Tucker, if you have or not.

Mr. Thurman: You may cross-examine.

The Witness: No, sir; I never met Mr. Spriggs after February 11th.

Mr. Thurman: Did I ask that question?

The Court: No.

Mr. Thurman: Well, maybe—did you meet him after February 11th?

The Court: He just said he didn't.

Mr. Thurman: I mean, did you meet him after that? A. No.

The Court: Cross-examine. [275]

Cross-Examination

By Mr. Choisser:

Q. Mr. Tucker, I think you said that Mr. Beals was present during all of these conversations?

A. Yes, sir.

Q. Concerning these exhibits that have been mentioned here, and he heard the same conversations—he had the same conversations with Mr. Spriggs at the same time you did?

(Testimony of Lloyd M. Tucker.)

A. Yes, sir.

Q. You never talked to him when Mr. Beals wasn't there concerning these exhibits?

A. No, sir.

The Court: Was Mr. Beals there the time that you said he told you that he was going to tell you something and if you said so——

A. (Interrupting): Yes, sir; he was there.

Mr. Choisser: Mr. Beals heard that, too?

A. Yes, sir.

Q. When these statements were presented to Mr. Spriggs for his signature, as you testified, was there anything said about he would have a chance to have his auditor go over them and correct and add to them or anything like that if he found any discrepancies? [276] A. No, sir.

Q. Nothing like that was said at all?

A. Nothing.

Mr. Choisser: I think that is all.

The Court: Step down. The next witness.

(The witness was excused.)

Mr. Thurman: Your Honor, in order to shorten it up I will make an offer to have Mr. Beals fix the amount of tax due for the year on count 2 in the indictment and count 3 in the indictment and also ask him for the amount of income tax that the defendant has failed to pay, and the Court has already ruled on that, and I assume he would rule the same on count 2 and count 3; that is, a summary and the findings by the Deputy Collector of

Internal Revenue would invade the province of the jury and it would not be admissible. Now, that is the Court's ruling with respect to count 1 in the indictment and——

The Court (Interrupting): Yes, I don't think an agent can testify as to what the profit was. He can say—well, I mean, it is his opinion after all. It is expert testimony and I don't think that that can be done. As far as the tax and the rates are concerned, it is a matter of law. If the Government is able to prove that is [277] income, or a certain amount during a certain year and that he failed to report, then the law prescribes what the tax is without the interposition of any Deputy Collector's opinion or calculation.

Mr. Thurman: The Government rests.

Mr. Choisser: Your Honor please, we have some motions to make. I wonder if you might excuse the jury and attend to this for the balance of the afternoon, and at the conclusion of this, it will probably be a little lengthy, might we ask for a recess until tomorrow morning?

The Court: Yes. Very well, the jury is excused until 10 o'clock tomorrow morning. You will remember the admonition. Do you wish to recess to gather your material together?

Mr. Choisser: Yes, a short time, if your Honor will permit it.

The Court: Very well.

(Whereupon a short recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, except the jury, the proceedings resumed as [278] follows:

The Court: I notice, Mr. Thurman, that no evidence was introduced in support—do you have the bill of particulars before you?

Mr. Thurman: Yes, your Honor.

The Court: On count 1 of the indictment with relation to the fees from Struckmeyer and Struckmeyer, or fees by Claude E. Spriggs.

Mr. Thurman: There was no attempt to do that, your Honor. The proof was lacking.

The Court: I see.

Mr. Choisser: In line with that, if your Honor please, may we move that those items be stricken from the bill of particulars?

The Court: Yes.

Mr. Thurman: The jury won't read the bill of patriculars, would they? We just haven't proven it, that is all.

Mr. Choisser: There is no proof offered on it.

Mr. Thurman: That is right.

The Court: There has been no proof offered on it. Did you produce Mrs. Jessie Gomez?

Mr. Thurman: Yes, she was here, your Honor.

The Court: Helen Pitman?

Mr. Thurman: She was here, your Honor.

The Court: And on Page 3, reduction of [279] business income allowed by the examining Internal Revenue agent.

Mr. Thurman: Yes, that was an allowance.

The Court: Very well. All right, make your motion.

Mr. Choisser: Your Honor please, at this time, first, the defendant moves the Court for judgment of acquittal upon count 1 of the indictment, upon the ground and for the reason that the evidence adduced wholly fails to support or substantiate the allegations of count 1. If your Honor would like, I would like to go to the bill of particulars and state what proof has been offered.

The Court: All right.

Mr. Choisser: Your Honor has already mentioned that there was no evidence offered as to the fees collected. That is A and B of the bill of particulars under count 1, and which we moved to strike from the bill of particulars. That is the item of $464.44.

The Court: Well, I never heard of that procedure before, but I guess it can be done, it can be stricken from the bill of particulars. The motion is granted to strike it from the bill of [280] particulars.

Mr. Thurman: We stipulate that it may be done.

Mr. Choisser: Now, the next, if your Honor please, is Sub-section A to C, "Unreported taxable capital gains consist of the following:" The first item of "Profit on the sale of interest in the Hi-De-Ho." Your Honor will remember the testimony was, in substance, that Mr. Spriggs paid $5,000.00 for it, that there is a check in evidence in the sum

of $491.00. Mr. Brown testified that he repaid him $4200.00 and $250.00 a month for some seven months, which amounted to approximately $1750 during '44, which does not sustain the allegations of the bill of particulars in Item "A" in any particular. That was the uncontradicted testimony.

The Court: Well, that would have been 5950.

Mr. Choisser: 5950 income, that is right, if your Honor please, but, under these two sets of figures it would have been an investment of $5,491.00. Then, if your Honor please, you will remember that Mr. Brown also admitted that he borrowed $1500.00 in December, '44, that he didn't repay for some time back until March of the following year which would—— [281]

The Court (Interrupting): Which would what?

Mr. Choisser: Which would either, if your Honor please, decrease the amount of money owed by Mr. Brown during that time, or in any event, the most that could be said of it, there was still only a capital gain of some $400.00 that was not recovered during the peirod of the remainder of the year '44.

The Court: Well, even if that capital gain of $400.00, it still—the charge could still be made as contained in count 1.

Mr. Choisser: Yes. Just for an instance, then, let's either use $400.00, leave that in and I will show you where we go from there. This profit on the sale of Lot 13, Block 1, there was no evidence submitted on that, to Mr. Stuart Bailey.

The Court: That is why you——

Mr. Thurman (Interrupting): Struck it out. We couldn't put the cost price in, if I remember correctly, isn't that correct?

Mr. Choisser: You say you did?

Mr. Thurman: My recollection is that we were unable to do it.

The Court: Yes, there was no—that was [282] the property in Safford, Arizona?

Mr. Choisser: Yes, business property.

Mr. Thurman: 1509 Something.

The Court: Yes, there was no evidence on the cost price of that and, therefore, there is no evidence to substantiate that Item "B" showing that that was a profit or unreported profit.

Mr. Choisser: We therefore move to stirke that item, Item "B" on count 1 of the indictment in the bill of particulars.

Mr. Thurman: $908.28 stricken. No objection.

The Court: All right.

Mr. Choisser: Now, the profit on the sale of real estate to Mr. Brown. There was no evidence of the cost price of that property adduced that I remember of. I think I am correct, nothing whatsoever; no evidence offered.

The Court: That is the property here in Phoenix?

Mr. Choisser: 756 East Portland.

The Court: Where he lived?

Mr. Choisser: Yes.

Mr. Thurman: That is the Struckmeyer deal.

The Court: Well, there was no evidence [283]

from Mr. Stuckmeyer this morning as to the amount of money——

Mr. Choisser: It was a different Struckmeyer, if your Honor please. It was the son that testified this morning.

The Court: The only testimony he gave this morning was concerning statements by the defendant.

Mr. Choisser: That is right.

The Court: He gave no testimony on the cost, and that was property which, under the stipulation, was originally purchased from Struckmeyer.

Mr. Choisser: This is a different Struckmeyer, if your Honor please. It was the young man's father, but there was no evidence produced as to the cost price of that, that is true.

Mr. Thurman: I don't agree with that. We put in the record of agreement and I read the consideration into the record. That was the purpose of it.

The Court: Oh, that was the property on Portland?

Mr. Thurman: Yes, sir. I think if you will bear with me, that he was to pay $3,000.00 for it, for this property under the agreement, and he paid a thousand dollars down. Now, that is a [284] matter of record, and three months later he sells it for a profit of $1500.00; two weeks later he sells it for a profit of $500.00, that he sold it from the sum of $1500.00, and Mr. Brown took over the balance of the contract.

Mr. Choisser: If your Honor please, we read

in what the deed showed. We didn't show what the true consideration of what passed. That is what I am getting at.

The Court: Well, there is the presumption there that the deed correctly reflected your stipulation. Your written stipulation went so far as to show that there was that sale and that the total purchase price there was $3,000.00 payable a thousand dollars in cash on October 15th, '44.

Mr. Choisser: Well, may we pass that for a minute, then, if your Honor please, and go to another item?

The Court: Yes.

Mr. Choisser: Now, those are two items we have left for consideration, at least, in unreported taxable gains, was $400.00 on the sale of interest in the Hi-De-Ho, if we consider that for a minute, and the $500.00 to Mr. Brown.

The Court: Yes. [285]

Mr. Choisser: Now, going to the next page, "Interest received from Mr. Otis Sasser," $500.00. If your Honor please, there was no competent evidence to show that that was interest. Mr. Sasser said he gave him $500.00.

The Court: Oh.

Mr. Choisser: You remember Mr. Sasser's testimony?

The Court: Sasser was the man who won this $3,000.00 in a poker game?

Mr. Choisser: He borrowed $3,000.00 from the defendant at one time.

The Court: Yes, and then he had $3,000.00 in cash?

Mr. Choisser: That is right.

The Court: Well, I don't know that it had to be interest.

Mr. Thurman: Use of the money.

The Court: As income.

Mr. Thurman: Use of the money.

The Court: It was income.

Mr. Choisser: Your Honor please, we put in evidence that there was other checks, other loans. He testified there was other loans made during that time and repayments at some time. As a matter of fact, there was some checks in [286] evidence to Mr. Sasser.

The Court: That is correct, and that would require you to weigh the evidence and decide whether or not he was telling the truth and that is for the jury to decide.

Mr. Choisser: Your Honor will recall that Mr. Sasser said that there was nothing said about interest, nothing said about what Mr. Spriggs wanted in return for this loan of money.

The Court: Yes, I remember it.

Mr. Choisser: He merely said, "I gave him some money," that is the gist of it, "I gave him some money." He might have been grateful, he might have gone and won $50,000.00 off of this 3,000, I don't know.

The Court: Also, Mr. Spriggs might have been worried about his income tax, too.

Mr. Choisser: That is right, but what I am getting at——

The Court (Interrupting): But that is up to the jury. The question is whether or not the jury believes Sasser.

Mr. Choisser: Then at this point, let's leave that $500.00. Interest paid by Mrs. Jessie Gomez. If there was any testimony—now, there was interests of $200.03 paid. [287]

Mr. Thurman: We will so stipulate.

The Court: All right.

Mr. Choisser: If your Honor will please go further in the record, it shows in the stipulation this was the sole and separate property of Evelyn Lee Spriggs. The property was acquired by her.

The Court: Under this stipulation made originally at the beginning of the trial, that is the farm, that is correct?

Mr. Thurman: We don't argue about that, that is correct. We will assume that it was, it was her personal property, but we are bothered here by the '44 income tax return of the defendant, Claude E. Spriggs, and whether it is true or not, and in this particular tax return, if I am correct—see that I am, here, because I don't want to make a misstatement, do they not show income from that particular property of Mrs. Spriggs?

The Court: It would not be criminal if he did show income in his return that came to somebody else that he was not obliged.

Mr. Thurman: Did he use the depreciation on

her property to cut down income tax? That is in here. [288]

The Court: That is, on the farm?

Mr. Thurman: No, that is on the Safford office.

The Court: We are talking about the farm now. Under this stipulation, Item Number 3, "Sale by Eldon Palmer to Evelyn Lee Spriggs on May 18th, 1943, of a farm situated north of the Gila River in Graham County." That was the farm that was sold to Jessie Gomez?

Mr. Choisser: That is right.

The Court: And the stipulation at the beginning of the trial was that it was acquired by and owned by Evelyn Lee Spriggs as her separate property?

Mr. Thurman: Oh, yes. Well, I am not going to stipulate to that.

The Court: So that would not be chargeable to this defendant in a criminal case.

Mr. Choisser: May that be stricken from the bill of particulars?

The Court: That may be stricken.

Mr. Choisser: Now, the next item is interest paid by Helen Pitman on various dates during the year 1944. There was no evidence whatsoever adduced, your Honor. If you will remember, Mrs. Pitman said she didn't know, it was handled [289] by some company. The records were offered in evidence and they were refused.

Mr. Thurman: Yes, under the Court's ruling, why, we didn't prove it.

Mr. Choisser: That is right.

The Court: All right.

Mr. Choisser: May that be stricken from the bill of particulars?

The Court: That may be stricken.

Mr. Choisser: Item "C." Now, we have interest paid by Mr. Wilburn Brown during each of the months June to December, '44, an item of $175.00. Your Honor will recall Mr. Brown testified it was 156 some odd dollars on direct testimony.

The Court: Well, it could be reduced to 156.

Mr. Choisser: Yes.

The Court: But the Government does not have to prove these precise amounts.

Mr. Choisser: I agree with you. Now, if your Honor please, that is the total unreported income or capital gain or interest which amounts, I think, roughly, now, of $1,556.00. The income from that year shows a net loss of $147.25 which has not been challenged. If those amounts were [290] in the income and the defendant was entitled to his deductions as shown by the exhibit, his income tax, then he still would owe no tax and would still have a loss for that period of time.

The Court: That is to say, that is $1657.00 total?

Mr. Choisser: That is right.

The Court: Is that correct?

Mr. Thurman: Well, it may be from his figures, but I don't agree to that.

The Court: No, 464 is out. $2,407.92 received that year from profit on the interest is now reduced, under the testimony, to $491.00.

Mr. Thurman: Which one is that? I don't follow you.

The Court: That is on Page 1.

Mr. Thurman: On Brown?

The Court: Interest in the Hi-De-Ho Bar.

Mr. Thurman: I can't follow that under any theory.

Mr. Choisser: He received $5900.00 back from Brown during '44 and he paid out——

Mr. Thurman (Interrupting): Why don't you let me talk, you have been talking and I have got to answer you. I have the figures for all of the testimony. The purchase price by Mr. Spriggs was [291] $5,000.00, there is no dispute as to that.

The Court: Then he spent whatever sum is was, $5,400.00.

Mr. Thurman: I have got that all down here. I have got that evidence shown here, a thousand and something, and there was $500.86 as reflected by the testimony of Mr. Brown and the testimony of Mr. Pomeroy, and adding those three figures up you get $5,992.08. This profit is added to the cost—he is given credit for that because it was profit that went into the business that was not taken out, so, certainly, that goes into his cost, and it is a just way to treat it, and the evidence is undisputed that he received $8,400.00.

The Court: No.

Mr. Thurman: Yes, your Honor, the undisputed evidence.

The Court: It is not that he received it in '44. The testimony was that the sale price was $8,700.00,

that there was $300.00, some allowance on a Ford, so it was $8,400.00.

Mr. Thurman: Paid during the year '44.

The Court: No, no, I don't think so, counsel. He said that he allowed him a thousand dollars that Spriggs owed him and paid him [292] $3,200.00 in cash, so he got $4,200.00 in cash and he paid him $250.00 a month for, whatever seven months would amount to, $1750.00 for the remainder of the year, so during the year '44 his total repaid was $5,950.00, not $8,400.00.

Mr. Thurman: This still has to be reported in the year, because it is over 30 per cent of the price. He is not entitled—it has got to be reported at that time.

The Court: As far as reporting it is concerned, counsel, you are not charging here with the failure to report it, you are charging him with the failure to disclose his profit and you are charging that he made the $2,407.92 profit during that year. In other words, his tax return is on a receipt basis and he did not receive that much money during that year. Now, the testimony of Mr. Brown was that he received the balance of it, but he repaid the balance of the money the next year.

Mr. Thurman: Which was $1,500.00 they spoke of and argued it and you deducted it, as I thought, from the amount that Mr. Spriggs would owe Mr. Brown. The $1,500.00, on a redirect question by me to Mr. Brown, I said, "Did it have anything to do at all with the payment for [293] the sale of

the Hi-De-Ho?" and he said, "No, it was in December, '44."

The Court: And he repaid it.

Mr. Thurman: Huh?

The Court: And Brown repaid it.

Mr. Thurman: I forget, whatever it was, had no transaction, nothing to do with the sale of the Hi-De-Ho.

The Court: That is the point that counsel is making. In other words, you are proceeding on a cash received basis for the year '44 and he did not receive $8,400.00. The testimony is that during that year that he did receive $4,200.00, plus $250.00 payments for those number of months, or a total of $1,750.00 for 7 months, or received $5,950.00. However, assuming, and there is testimony here that there was a profit of $500.00 from the Hi-De-Ho which was not reported, that would be $491.00, plus $500.00——

Mr. Choisser (Interrupting): And plus $5,000.00, the initial purchase price.

The Court: I am talking about what the Government is substantiating here. In other words, on count 1 they have produced sufficient proof concerning which reasonable minds might differ of $991.00, and $500.00 and $156.00 and $500.00 [294] from Sasser, so that is a total of about $2,100.00, instead of the figure you gave of $1,657.00. Now, if the jury believes that there was a payment of $1,500.00; that is to say, what was testified to was a loan in December, '44, and was a repayment to Spriggs by Brown probably they might believe

that, I don't know, then it would be up that much. So, let me see, now.

Mr. Choisser: Your Honor please, that is the payment of $1,500.00 was from Mr. Spriggs to Mr. Brown, not the other way.

The Court: Oh, Spriggs loaned Brown $1,500.00?

Mr. Choisser: That is right.

The Court: Yes, then that could be——

Mr. Choisser: And that is from Mr. Spriggs to Mr. Brown.

The Court: Well, taking the evidence in its most favorable light to the Government in indulging all presumptions against the maker of the motion, it seems to me the most that can be spelled out of the evidence in support of count 1 is a total of unreported income of $2,147.00, made up of $491.00—wait a minute here, that is not 491—oh, yes. He paid out $5,491.00 and in the year '44 received $5,950.00, so the difference there [295] would be $459.00. The $500.00 profit which Mr. Brown testified was made during the period of partnership, which the jury may believe or may not——

Mr. Choisser (Interrupting): Would it make a difference, if your Honor please, you remember further Mr. Brown's testimony that Mr. Spriggs never received it. That was put back into the business.

The Court: It was, nevertheless, a profit.

Mr. Choisser: I don't know how it would be figured, I will be frank to confess. He did say Mr.

Spriggs didn't receive it. You remember he said it went back into the business to buy stock.

The Court: Well, you can argue that to the jury. As I say, indulging in all of the presumptions against the maker of the motion and taking the evidence offered by the Government in its most favorable light to the Government which the Court must do in such a motion as this, it is possible the jury will believe it was a profit and was income, so there is that $500.00, that $500.00 which may be considered as profit on the Portland Street place and the $500.00 from Mr. Sasser which the jury may consider, and $156.00 interest, or a total of $2,115.00 unreported [296] income for the year '44 under the evidence. Now, the question is whether or not, taking his loss and subtracting $147.25 from that, his income would be $1,967.75 that year, his net income. Would he then have had to pay a tax? That is the question.

Mr. Choisser: Then according to the exhibit and his dependants listed, he would be entitled to the sum of $2,000.00 deduction, according to the exhibit in evidence. He has his wife and two children.

The Court: What do you have to say to that, Mr. Thurman?

Mr. Thurman: Only for the sur-tax he would be entitled to.

The Court: Well, you consult with your experts there, assuming that his net income was $1,967.75, would he have had any tax that year?

Mr. Choisser: May I have that figure again?

The Court: $1,967.75 is the way I figure for '44.

Mr. Thurman: Then his wife's exemptions would come off in his own separate return.

The Court: No charge is made here that there were any deductions that were wrong, and the only thing to determine would be the inside of the—that is on [297] the back page.

Mr. Beals: Page 3, sir?

The Court: Oh, yes, the total computation. Well, you would add $1,967.75 to $1,059.00, wouldn't you? There is adjusted gross income.

Mr. Beals: Yes, sir.

The Court: $3,026.84, from which you would deduct $1,206.34, so that the item appearing on Line 3, instead of being $147.25 loss, would be $1,820.50.

Mr. Beals: Yes, sir.

The Court: Net income.

Mr. Beals: Yes, sir.

The Court: From which he would be entitled to deduct $2,000.00.

Mr. Beals: There is the question. If this is his separate return, then he would not be entitled to claim his wife. She would be required to file her own return.

The Court: Well, there is not made a charge of fraud in the bill of particulars, so I don't see how I can take that into consideration. In other words, I have got to assume that all of these other things are correct and that the one item in the bill of particulars that is wrong is $147.25 loss which should

be, the way I [298] calculate it, $1,820.50, and there not having been any charge made of falsity with relation to the bill of particulars, with relation to the asserted wrongful claim for exemption, the Court must assume that the Government did not intend to rely on it and did not warn the defendant sufficiently in advance so that he could defend. That being the case, it looks to me like you have not proven any case in count 1.

Mr. Thurman: I don't remember exactly the prerequisite of the demand for a bill of particulars, whether it included that. We gave him a breakdown of the things that we claimed, the elements——

The Court: The element of fraud?

Mr. Thurman: I had it left out, yes, and that is what they asked for. I didn't think the bill of particulars was as broad to furnish them with all of the testimony that, or evidence that we might have, and the Court, I believe, passed upon this bill of particulars. I forget the exact fact situation, whether we furnished it or whether Judge Ling ordered it and approved it, but it is not my understanding, I may be in error, but I always thought where a prima facie case is made, if one has been made, that we then can [299] go in and show other acts even though not included in the indictment or in the bill of particulars, to show intent, and all of those things. I don't think we are bound by this. I may be in error. I don't understand the rule of evidence in criminal cases——

The Court: Yes, in an income tax case you can show similar transactions for other years to show

intent, but here, the charge is that he wilfully and knowingly attempted to evade his income tax by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return. It must be shown how it was false and fraudulent. You don't think it was false and fraudulent because he claimed exemption of $2,000.00 and was only required to claim $1,500.00?

Mr. Thurman: We allege it in the indictment.

The Court: No, you don't.

Mr. Thurman: We allege it in substance how much he was supposed to pay and what he didn't pay.

The Court: All of your calculations had nothing to do with that. Your whole bill of particulars does not say anything about it. You arrive at the same figures here in the bill of [300] particulars that you have in your indictment, you have entirely different items.

Mr. Thurman: It is our understanding he only has a thousand dollars exemption. Under normal tax, personal income tax return he would owe a tax of 24.61½.

The Court: You mean, if instead of 2,000 tax there was a thousand dollars?

Mr. Beals: No, sir. The $2,000.00 deduction for sur-tax computation is correct, however, for a normal tax deduction it would only be 1,000, 500 for each, husband and wife.

Q. Well, they have two children here.

Mr. Beals: But they don't get the normal tax exemption for the children.

The Court: Well, all right now, wait a minute.

Mr. Beals: Reading on Line 8: "Enter your normal tax exemption," and so on.

The Court: Well, he is still entitled to deduct $2,000.00 sur-tax exemption.

Mr. Beals: For sur-tax computation.

The Court: All right, so that still—he still shows a net loss, but on top of that he is also entitled to enter his normal tax exemption of what, 500? [301]

Mr. Beals: No, sir. I think there is a misunderstanding. His income on Line 3, according to the computations—from your computations, he had $1,820.50.

The Court: Yes.

Mr. Beals: All right. Now, we have to compute the normal tax and sur-tax. Now, in the sur-tax computation he has four sur-tax exemptions of $500.00 each making a total of $2,000.00 which would exceed the amount of 18——

The Court: So he has no sur-tax.

Mr. Beals: Now, we compute the normal tax beginning back with the $1,820.50.

The Court: On Line 7.

Mr. Beals: Line 7. Now, the figure you enter on Line 3 above.

The Court: That is $1,820.50?

Mr. Beals: Yes, sir; less $500.00 for each taxpayer, and assuming here that we have two taxpayers, then it would be a thousand dollars, the balance subject to normal tax of $820.50, net liability of 24.61½.

The Court: Well, that is too great a disparity, in my judgment, between the amount alleged in count 1 and the tax which we calculate to be due as to invalidate all presumptions in [302] favor of the Government. I realize that the Government is not required to prove all of these things, but when the disparity becomes as great as it is, $24.61 and $854.91, it would be a miscarriage of justice to permit any verdict to stand. The motion for judgment of acquittal as to count 1 is granted.

Mr. Choisser: Now, if your Honor please, we move for judgment of acquittal as to count 2 of the indictment, upon the ground and for the reason that the evidence does not substantiate the allegations of count 2 of the indictment.

Mr. Thurman: Count 1 was dismissed, was it, your Honor?

The Court: Motion for judgment of acquittal was granted as to count 1.

Mr. Choisser: Now, going on to count 2, and for the same reason, and under "A," taxable profit on sale of real property in Phoenix to Stephen B. Rayburn. There was no purchase price whatsoever assigned as to that item in the bill of particulars, Item "A" under count 2.

The Court: That is property——

Mr. Choisser (Interrupting): Property purchased from Wilkinson.

The Court: That is correct, Mr. Thurman, [303] there was no evidence showing the amount of money that the defendant paid for the property.

Mr. Thurman: Well, I understand, under the Court's ruling, that is correct.

The Court: Well, can you spell anything out here where there was evidence to show?

Mr. Thurman: Well——

The Court (Interrupting): Wilkinson was not produced. There was some escrows which were produced in here, but they were not admitted in evidence because they were not connected with the defendant. Nobody was produced to identify his signature. All of the three men produced from the Title Company testified they didn't know him.

Mr. Thurman: That is right. I thought probably the name of the defendant being so close to Claude E. Spriggs that it might be a basis for admissibility of the documents, especially, your Honor, when the property was subsequently sold by Mr. Spriggs, the same property.

The Court: Well, it was sold by Claude E. Spriggs, there isn't any doubt about it, but the record shows absolutely nothing to tie this defendant to that person.

Mr. Thurman: It has the name "Claude E. [304] Spriggs" on the escrow papers.

The Court: Well——

Mr. Thurman (Interrupting): And the same property, he must have had title. The Court has ruled on it. We had that pretrial——

The Court (Interrupting): Yes, but I think, counsel, that you would feel badly, if, in a criminal case, that kind of evidence were permitted.

Mr. Choisser: May it be stricken from count 2

of the bill of particulars, the amount of $1,958.21?

The Court: Stricken.

Mr. Thurman: That is "A"?

The Court: There wasn't even any showing that the person from whom he purchased the property was not available, and dead or anything.

Mr. Thurman: Well, we were unable to get him, if any one of them are dead, but the fact is, the escrow agent didn't know Spriggs.

The Court: Well, all right.

Mr. Choisser: Now, as to Item "B," if your Honor please, the property in Safford, Arizona, under our stipulation that shows that that was in the separate property of Evelyn Lee Spriggs.

The Court: Is that what you call the business property? [305]

Mr. Choisser: That is right.

The Court: Wait just a moment, now. Which item is that in the written stipulation?

Mr. Choisser: Item 8 and 9, if your Honor please, deed from Marion Lee to Evelyn Lee Spriggs, and sale——

The Court (Interrupting): Sale by Jessie Udall to Marion Lee, 7 and 8, Marion Lee to Evelyn Lee Spriggs, December 24th, 1938; sale by Claude E. Spriggs, and the testimony was Evelyn Spriggs.

Mr. Choisser: That is right.

The Court: And the stipulation was that the property likewise was the separate property of Evelyn Lee Spriggs.

Mr. Choisser: That is right.

Mr. Thurman: I might call the Court's atten-

tion that I am still interested now in the '46 income tax return that is used by the defendant under his personal name and the use of depreciation allowable on that property, and that is the evidence too. I can't see how he gets away from bringing his wife's property into it, why it is not a joint return.

The Court: Well, that might be evidence, might be considered and argued as evidence of an [306] attempt to defeat and evade income tax later by taking a deduction that belonged to somebody else, but that does not make a taxable profit. It would make a wrongful deduction.

Mr. Thurman: Well, as I said, I was under the impression those things could go into the evidence regardless of the bill of particulars. I was wrong, probably.

The Court: Well, you stipulated it was separate property.

Mr. Thurman: That is right, and was used by him in his income tax return as depreciation.

The Court: But that still would not make a profit to him. It still might be an effort on his part to defeat and evade income tax by taking a depreciation allowance of somebody else's property to which he was not entitled, but it wouldn't make profit to him.

Mr. Thurman: Oh, no.

The Court: So that item is out.

Mr. Choisser: And Item "B" of count 2 may be stricken?

The Court: Stricken.

Mr. Choisser: Now, we come to Item "C" settle-

ment of conditional sales contract. I think your Honor will remember that Wilburn Brown, at [307] one time, testified he gave him this $500.00 to keep him out of his hair, I believe is his exact words.

The Court: Well, it is on the check. Your motion to strike that is denied.

Mr. Choisser: Then we have "Depreciation overstated, $1,150.00." If we go back to our same reasoning now, from which I assume we can't under the Court's ruling, that is only a total, then, of $1,650.69. That is the same deduction to apply as before of $2,000.00.

The Court: Let me see the '46 return. Now, which was the Safford property on the depreciation?

Mr. Beals: On the '46 return, sir.

The Court: Yes, adobe or frame?

Mr. Beals: Cement, 1939.

The Court: Oh, yes. All right. Even assuming, counsel, that on the 1150 and the 500, that would be $1,650.00, that it would not bring it up to taxable income that year, nevertheless, I think in view of the fact that there is the charge of fraud, and that the testimony shows that in his '46 return he attempted to claim depreciation on his wife's property, which was only $125.00, it, nevertheless, may be considered by the jury. I don't think you should be entitled [308] to judgment of acquittal on count 2.

Mr. Choisser: Well, as I say again, if your Honor please, the '46 returns have not been challenged in that manner. They have not raised that

question at all as to whether or not he was entitled to take this deduction, and it was not in the indictment, it is not in the bill of particulars and, as your Honor stated, it might be something else, but we are confronted with the instant case at bar, and even if that should be erroneous and should not be in there, it still does not bring it up to where he would be required to pay any tax, even if that item was not in there at all.

The Court: You mean, even disallowing the depreciation of $125.00?

Mr. Choisser: That is right, he still would not be required to pay any tax, so it could not be used as a basis for any fraud because it would not amount to that amount as a matter of law under our computations.

The Court: Well, let's see.

Mr. Thurman: Mr. Choisser says that there would not be a tax in '46. Maybe we should check against it and shorten it up.

Mr. Choisser: Well, because you only [309] have——

The Court (Interrupting): Well, Item "A," there, the first one on Page 2, of 1946, is stricken, because there was no purchase price shown for the Rayburn sale of property. Item "B" was stricken because that was the property, the separate property, under the stipulation, of Mrs. Spriggs, which leaves Item "C," $500.00, and also "Depreciation overstated" of $1,150.69, or a total of $1,650.69.

Mr. Choisser: And a loss of $350.61 on the top of Page 3.

The Court: From which you deducted that from the $1,650.69, is $1,300.08. Now, you add to that the item of depreciation which he claimed on the——

Mr. Choisser (Interrupting): '46 return.

The Court: On the '46 return, on the Safford property.

Mr. Thurman: $1,425.08.

The Court: No.

Mr. Choisser: 125——

The Court: $125.00, is that right, Mr. Beals?

Mr. Beals: $125.00.

The Court: Or $1,425.08.

Mr. Choisser: The same exemptions are claimed for [310] '46 as we claimed previously, the same dependants.

The Court: There is no complaint that the deductions made, such as interest paid, taxes and doctor bills are wrong, so what you would do, you would add $1,425.00 to the item on Line 1 of $1,548.00, is that correct?

Mr. Beals: Yes, sir.

Mr. Choisser: That is right.

The Court: $2,973.75. Deduct $1,899.28, am I correct, you still deduct the 1899, is that correct, Mr. Beals, you have the form there before you?

Mr. Beals: What is the total amount for Line 1?

The Court: $1,548.67, plus $1,425.08.

Mr. Beals: $1,425.08.

The Court: That was $1,300.00 plus 125, which he wrongfully claimed, and then instead of having "None," he would have a net income of $1,074.47, is that correct?

Mr. Beals: That is right, and there would be no tax on that return.

The Court: The motion for judgment of acquittal as to count 2 is granted.

Mr. Choisser: We next move for judgment [311] of acquittal as to count 3 in the indictment, upon the grounds and for the reasons that the evidence adduced does not sustain the allegations of count 3 of the indictment, and to proceed with that, we have Item "A" in the bill of particulars on count 3, which is the sale of a piece of property to one, Jesse Arreola. As a matter of fact, all of these are in the same category. There was no evidence at all as to the purchase price on any of these three.

The Court: Lots 7 and 8.

Mr. Choisser: Lots 7 and 8, Block 15.

The Court: Wait a minute, wasn't there some testimony as to the purchase price of Lots 7 and 8? Let's see, in his written statement, question and answer statement, didn't you cover that?

Mr. Choisser: Not as to the condition it was in on the date '47, as I recall, I think, nothing, he said, was paid for the two lots, if I recall. Mr. Tucker said it is not covered.

The Court: Oh, that was 47 and 48?

Mr. Choisser: Yes.

The Court: The Eubanks tract, but there is no reference of any sale of Lots 47 and 48.

Mr. Choisser: Lots 7 and 8, Block 15, Collins Addition. [312]

The Court: Yes.

Mr. Thurman: Mrs. Arreola, she was not sub-

poenaed. Why, I don't know. She wasn't here to testify.

The Court: There is nothing here to show that he sold it or the price that he sold it for.

Mr. Thurman: Yes, that he sold it, but we weren't able to show by the records of the Title Company the initial price that Mr. Spriggs paid for it, is that correct?

The Court: All right, that is stricken.

Mr. Choisser: Now, the same, I think, if your Honor please, applies to Item "B." That was the sale of Lot 5 to Howard M. Vandenberg. That concerns the acquisition of that property from a Mrs. Fisher, I believe, and there is no evidence whatsoever concerning Mrs. Fisher or of that transaction.

The Court: Do you recall any evidence as to the purchase price of that property?

Mr. Thurman: No, the same fact situation, we relied upon the escrow. That is my recollection.

The Court: Well, that will be stricken, then. And the depreciation. Let's see, then, take the '47 return, and on Line 1, the figure, [313] $2,601.32, you add the depreciation overstated of $2,978.60, so that figure would then be $5,579.91.

Mr. Choisser: Your Honor, may I be heard on that addition of depreciation overstated, $2,-978.60? I again submit that there is no competent evidence from which that figure can be produced in any particular.

The Court: There is evidence here upon which reasonable minds might differ.

Mr. Choisser: But, as to the amount, if your

Honor please, we would have to have some amount to enter in this computation.

The Court: That is a matter of argument. I think it might be almost any amount. In any event, this is the amount the Government has chosen to stand on, and there is sufficient evidence to believe the jury would have to reach that conclusion, so that would be added to that item and then you would deduct the figure there of $773.15, so the total of Line 3 would then be $4,806.76, is that right?

Mr. Beals: 77.

The Court: From which you would deduct $2,000.00, so that instead of Line 5 being "None," it would be $2,806.76, is that correct? [314]

Mr. Beals: Yes, sir.

Mr. Choisser: Now, before we go, may I point out the error of $100.61. I don't know whether that is being included or not. I think we should be given credit for the last item on the bill of particulars in count 3.

The Court: All right, we will deduct $100.61 from this last figure, so that that figure, instead of being "None," would be $2,706.15, upon which there would be a tax of—about what would the tax be?

Mr. Beals: Subject to a recheck, $527.58.

The Court: The motion for judgment of acquittal as to the 3d count is denied. The defendant will be on his proof. We will resume at 10 o'clock tomorrow morning as to the 3d count only.

(Whereupon a recess was had at 4:45 o'clock p.m. of the same day.) [315]

(10 o'clock a.m., November 16th, 1951, pursuant to adjournment, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court: The record may show the defendant is present in person and by counsel and the jury is present and each one in place.

Gentlemen of the jury, on counts 1 and 2 of the indictment, motion for judgment of acquittal was granted by the Court, which means the defense is on his proof as to only count 3. For that reason, you will disregard in your deliberations and consideration the charges and allegations contained in count 1 concerning the calendar year '44 and the tax return in '45, and the charges contained in count 2 for the calendar year '46, the return filed on or about the 10th day of January, 1947. There remains the count 3 relating to the income tax return filed on the 7th of January, 1948, for the taxable year '47.

Do you wish to make an opening statement, Mr. Choisser.

Mr. Choisser: We reserve our opening statement. I wonder if your Honor will consider instructing the jury as to the items in the bill [316] of particulars that they are only concerned with now. There are some of those, I believe, there was some testimony offered to the jury on those.

The Court: Yes, that is right. In connection with count 3, the bill of particulars furnished by the Government asserted that the claimed income was $7,048.95, consisting of the following items:

"Unreported taxable capital gains:

"(A) Taxable portion of profit on sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, to Jesse Arreola," an item of $1,698.15.

No evidence was produced by the Government whatsoever on that item, neither Jesse Arreola, showing the cost price or the sale price, consequently, that item has been stricken from the bill of particulars, and the evidence concerning that you are to disregard except as I may instruct you later in the instructions.

"(B) Taxable portion of profit on sale of Lot 5, Eastwood Place, Phoenix, Arizona, to Howard M. Vandenberg," $544.64.

You will recall that Mr. Vandenberg testified as to what he paid for the lot to Mr. Spriggs, but there was absolutely no testimony introduced or any evidence of any kind showing what the [317] defendant had originally paid for the lot, consequently, the item was stricken, or a total of $2,-242.79.

There remains for consideration in connection with the trial the following item described in the bill of particulars as "Depreciation overstated." This item consists of the overstatement of depreciation by the defendant is the result of his having falsely represented the cost of the property located on Henshaw Road, Phoenix, Arizona, on which he claimed excessive depreciation in the amount of $2,978.60.

Mr. Choisser: May I have one moment, if your Honor please.

The Court: Yes.

Mr. Choisser: Your Honor please, we will reserve our statement to the jury.

The Court: Very well. [318]

(After recess, all parties as heretofore mentioned being present, the trial resumed as follows:)

The Court: The record may show the defendant is present in person with his counsel, and the jury is present and in their respective places. This is the time for argument.

Mr. Choisser: I wish to renew my motion on behalf of the defendant for judgment of acquittal.

The Court: Denied.

(Whereupon, counsel for both sides presented their closing arguments to the jury, after which, the Court instructed the jury, as follows:) [324]

COURT'S CHARGE TO THE JURY

The Court: Gentlemen of the jury, the instructions will be rather long. They will be divided generally into three sections; general instructions applicable to the matter of receiving evidence; the next section will be treating the particular statute involved here, and then there will be some closing instructions.

In these instructions, as I shall give them to you, it is your duty to follow them, and it is your exclusive province to determine the facts in this case

and to consider and weigh all the evidence that has been introduced.

The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with these rules of law as I shall state them to you.

Now, if in these instructions any direction or idea be stated in varying ways, you must remember the law is not an exact science, or if a subject matter is treated first or last, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual [325] point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each one in the light of all the others. Nor are you to regard any repetition or partial repetition of an instruction or an idea *contain* in any instruction as a special emphasis on that instruction.

Facts are established by evidence, and evidence is of two kinds. It may be either direct or indirect. Direct evidence is that which proves a fact directly in dispute, without any inference or a presumption, and which in itself, if true, conclusively establishes the fact in issue. Indirect evidence, sometimes called circumstantial evidence, is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or a presumption of its existence.

The law makes no distinction between circum-

stantial evidence and direct evidence in the degree of proof required for a conviction. In other words, circumstantial evidence is on no different or lower plane than any other form of evidence. The law only requires that the jury shall be satisfied beyond a reasonable doubt and [326] to a moral certainty by evidence of either the one character or the other, or both, before voting for conviction of an accused person.

If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence.

The rule concerning circumstantial evidence does not permit you as jurors to indulge, however, in speculation or surmise or conjecture or guess work in order to supply any element of the offense alleged by the Government in this case to have taken place where proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guess work can never be substituted in lieu of proof in order to justify the conviction of an accused person.

Indirect or circumstantial evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts, and a presumption is evidence, and unless declared by law to be conclusive, and there are [327] no conclusive presumptions in this case, a presumption

may be controverted by other evidence, direct or indirect, or by another presumption, but unless so controverted, the jury is bound to find according to the presumption. I will illustrate a presumption to you. The presumption is that the course of business usually established has been followed, or a person is presumed to be innocent until proven guilty beyond a reasonable doubt. Those presumptions are evidence, but they must be overcome by evidence which satisfies you to a moral certainty and beyond a reasonable doubt that a person is not innocent or that the course of business has not been followed.

An inference, on the other hand, is a deduction which the reason of the jury draws from other facts which are proved. An inference must be founded on another fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions or habits of men, or the particular propensities or passions or habits or customs of the person whose act is in question, or by the course of business, or by the course of nature. Now, the word "propensity" as I have used it, means any natural or habitual inclination [328] or tendency.

You are not bound to decide in conformity with the testimony of any number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses, or as against a presumption, or against other evidence which appeals to your minds with more convincing force. This rule of law does not mean that you are

at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified. It does mean that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient proof for any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance [329] of probability pointing to the accuracy and honesty of the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor, any party? Was he, in other words, a biased or impartial witness? What degree of intelligence, what quality of memory, what grade of

moral purpose, so far as concerned this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused his testimony to appear on the surface as being less [330] trustworthy than it really was? Was the witness without fault of his own, confused or embarrassed, and thus placed in a light not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the evidence admitted in the trial of this action.

Any evidence that has been received of an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a defendant, rather than his own testimony in this trial, ought to be viewed by you with caution.

From time to time counsel for one or the other parties has interposed objections to evidence. Counsel not only have the right, but the duty, to make any and all objections which are deemed advisable or appropriate, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of such objections.

At times throughout the trial the judge has been called upon to pass on the question of whether or

not certain offered evidence might or might [331] not properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law, and in admitting evidence to which an objection might have been made, the judge does not determine what weight should be given such evidence, nor does he pass on the credibility of any witness. As to any offer of evidence that was rejected by the judge, you, of course, must not consider the same, and as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

The law does not require an accused person to prove his innocence, which in many cases might be impossible, but on the contrary, the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence his guilt, and all the elements of his guilt. If the Government fails to so prove beyond a reasonable doubt and to a moral certainty all the elements of the offenses charged here, including criminal intent and wilfullness, as I shall outline that to you later, you must find the accused not guilty. [332]

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of any like offenses. No such specious argument or reason can be weighty enough to justify

you in laying aside that just and humane rule of law which requires you to acquit the accused person unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty, and, of course, suspicion is not evidence.

You are instructed that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chance it is more probable that the accused is guilty than innocent to warrant a conviction. The accused must be proved to be guilty so clearly that there is no reasonable theory upon which he can be said to be innocent when all the evidence is considered together. Mere opportunity of the accused to commit the crime charged is insufficient to justify a verdict of guilty, and in every criminal case the proof must substantially conform to the material allegations of the indictment.

By the arrest of the defendant and the [333] return of the indictment, no presumption whatsoever arises to indicate that the defendant is guilty, or that he had any connection or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt and to a moral certainty, and this presumption of innocence follows him to the jury room to be weighed by you as evidence along with the other evidence. This rule applies to every material element of the offense charged, and as I have

indicatd, there are several and I shall outline them to you.

Now, "reasonable doubt" has been variously defined. I will read you the legal definition in a moment, but my own definition of a reasonable doubt is one that you can probably remember very easily. A reasonable doubt is a doubt that you can assign a good cause for having. Legally defined, a reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence [334] submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture, for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. Without it being restated or repeated again, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying each and every one of the instructions.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or bias, to apply a strained construction, one that is

unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you might reach a contrary conclusion. Whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated [335] equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

Where two or more equally reasonably inferences may, in the light of all the evidence, be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted rather than one leading to a conclusion of guilt. In order to sustain a conviction on circumstantial evidence, all the circumstances proved must not only be consistent with each other, but they must be consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt.

If the circumstantial evidence relied upon in a case is such that it may reasonably lead to two opposite conclusions, one pointing to the guilt of the defendant, and the other to his innocence, then it is not sufficient to convict upon, for in such an event, the jury must adopt the hypothesis of innocence and find an accused person not guilty.

You are the sole judges of the credibility [336] and the weight which is to be given to the different witnesses who have testified upon this trial and to the evidence which has been introduced. A witness

is presumed to speak the truth. This presumption, however, may be repelled by the maner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of the evidence or testimony of any witnss as may be dictated to you by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witnesses testified, as I have heretofore delineated them to you, and in addition to that the relation that he might bear to the Government or to the defendant, the interest he may have in the case, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses or other evidence, if at all, and every matter that tends reasonably [337] to shed light upon the credibility of the witnesses.

If a witness has shown knowingly to have testified falsely at this trial touching any material matter, the jury should distrust the testimony of that witness in other particulars, and in that case you are at liberty to disregard the whole of that witness' testimony.

The law does not require the defendant to take the witness stand in his own defense. The defendant in this case did not take the witness stand, but

because of that fact you are not to indulge in any inference or presumption whatsoever concerning his guilt or innocence. The mere fact that a witness is connected with the Government of the United States in any capacity whatsoever does not mean that the testimony of such a witness is entitled to any greater weight or credence by reason of that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed.

In every crime or public offense there must exist a union or joint operation of act and intent. To constitute a criminal intent, it is [338] merely necessary that a person intended to do such an act which, if committed, will constitute a crime. This does not mean that one must intend all the consequences of his conduct or that he must know that such conduct is unlawful to be guilty of a public offense such as is charged in this case. Criminal intent must be proved beyond a reasonable doubt, but since it is psychologically impossible to enter the mind of the accused to find the intent at the date of the alleged offense, it may be established by circumstances and conduct, both before, at, and subsequent to the acts charged.

The defendant's act and conduct considered in their relation to the charge made, may establish satisfactorily a criminal intent not withstanding the declaration of the defendant that no such intent was present in his mind. The law presumes that

every man intends the natural and ordinary consequences of his acts.

Wrongful acts, knowingly, wilfully and deliberately committed cannot be justified on the ground of innocent intent. The color of the act, done with the knowledge of its natural or necessary results, determines the complexion of the intent. [339]

You should examine all of the evidence, all of the facts and circumstances which tend to shed light on what the intent may or may not have existed as of the time charged in the indictment.

If a material witness is not produced by either side and is available to that side, you may infer that the testimony of such witness not produced would be adverse or against the side which failed to produce him.

You cannot find the defendant guilty upon the remaining count in the indictment unless you are convinced beyond a reasonable doubt by the evidence of the truth of every material allegation and element of such count.

Coming now to the particular charges in this case. I have heretofore charged you that the return in the indictment is no evidence of the guilt of the defendant. The defendant pleaded not guilty to this count, the remaining count 3, which will be shortly placed with you to respond as a jury with a verdict as to whether or not the defendant is or is not guilty as to that count.

Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a [340] principal.

Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Now, there is a distinction between the civil liability of a defendant and the criminal liability, and this is, as you know, a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled the civil liability for the payment of the taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case, except as it may throw some light on the intent of wilfullness of the defendant.

An attempt to evade income taxes is a separate offense for each year.

The fact that an individual's name is signed to a filed return should be prima facie evidence for all purposes that the return was actually signed by him.

The indictment in this case is brought under the provisions of Title 26, Section 145(b), the material portions of which I shall now read to you:

"Any person who wilfully attempts in any [341] manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a crime."

The act prescribes the punishment, but you are not to be concerned with that, as in the event you should arrive at a verdict of guilty, the respon-

sibility for the determining of any punishment rests solely upon the judge.

The indictment in this case, in count 3, I will read that count to you:

"That on or about the 7th day of January, 1948, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona at Phoenix, a false and fraudulent income tax return wherein it was stated that his net income for said calendar year was the sum of $1,928.19 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for said cadendar year was [342] the sum of $7,048.95, upon which said net income there was owing to the United States of America an income tax of $1,058.03."

There is another provision in the statute which makes it an offense to file a false return. You must take note of the fact that the defendant is not charged here with having filed a false return. He is charged here with a wilfull atttempt to defeat his income tax. If you find that this return was false, and you do not find it was an attempt to defeat his tax—evade and defeat his tax, then you must acquit him. You may find that his effort to defeat and evade the tax occurred and he is guilty of that offense even though you may find under

the evidence that the precise and exact amount of tax claimed by the Government to be due for the year 1947 has not been proven, and as a matter of fact, the Government has conceded that they have not proven the total amount of income, so that the tax due under any calculation of the Government's theory of the case is less than the amount of $1,058.03, but it is for you to determine whether or not there is a substantial variance between the amount of $1,058.03 and the amount of tax which it is asserted by the Government that he attempted to [343] defeat and evade.

You are instructed that there is no provision in the statute or in the regulations as to any form or the precise contents on an income tax return. It is required that you shall file a return showing your gross income.

Section 22 of Title 26 of the United States Code defines "gross income," as follows:

" 'Gross income,' includes gains, profits and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocation, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

Under the provisions of the Internal Revenue Law, the Commissioner of Internal Revenue is

authorized to prescribe regulations. He has prescribed Regulation 111. There are certain provisions in that regulation which I shall read to you, 29.23 (1)-1; (1)-2; (1)-4 and (1)-5 as [344] far as they are applicable.

(1)-1 relates to depreciation: "A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under another section of the code as held by the taxpayer for the production of income," and you are instructed that the property involved here, what street is it?

Mr. Choisser: Henshaw.

The Court: The Henshaw property—"as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan, not necessarily at a uniform rate, whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with another section [345] of the act. Due regard must also be given to expenditures for current upkeep." You will note there is no provision or requirement

that a specific percentage can or may or shall be deducted for depreciation.

29.23 (1)-2, in its material portions, reads, as follows:

"Depreciable property.

"The necessity for a depreciation allowance arises from the fact that certain property used in the business, or treated as held by the taxpayer for the production of income, gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. It does not apply to inventories or to stock in trade, or to land apart from the improvements or physical development added to it."

Section 29.23 (1)-4, in its material portion, [346] reads, as follows:

"The capital sum to be replaced by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. To this amount should be added from time to time the cost of improvements, additions, and betterments, and from it should be deducted from time to time the amount of any definite loss or damage sustained by the property through casualty, as distinguished from

the gradual exhaustion of its utility which is the basis of the depreciation allowance."

The material portions of Section 29.23 (1)-5, "Method of computing depreciation allowance," reads, as follows:

"The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist [347] at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property, the unrecovered cost or other basis.

"Therefore, taxpayers must furnish full and complete information with respect to the cost or other basis of the assets in respect of which depreciation is claimed, their age, condition, and remaining useful life, the portion of their cost or other basis which has been recovered through depreciation al-

lowances for prior taxable years, and such other information as the Commissioner may require in substantiation of the deduction claimed."

Now, previous good character of the defendant has been introduced, and if such has been satisfactorily shown to you, you may take that into consideration in connection with the other evidence in the case to determine the guilt or innocence of the defendant, and if in your judgment [348] as reasonable men it is warranted, you may acquit solely on the basis of character evidence.

Now, there is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question which depends upon evidence presented to them for the exercise of their judgment. You are expected to use your good sense, to consider the evidence for the purpose only for which it was admitted in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no reasonable doubt remains the Government is entitled to the verdict, for to the jury, to you, belongs exclusively the duty to determine the facts.

Now, if the judge has said or done anything which has suggested to you that he is inclined to favor the claims or positions of either party, either the Government or the defendant in this

case, you will not suffer yourselves to be influenced by that suggestion. The judge has not [349] expressed nor intended to express, or intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, except those which have been conceded by the parties, what inferences should be drawn from the evidence, if any, and if any expression of the judge has seemed to indicate to you any opinion relating to any of these matters you are instructed to disregard it.

You should not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

It is your duty as jurors to consult with one another when you go to the jury room and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment in the case.

To each of you I would say that you must decide the case for yourselves, but you should do so only after a careful consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you [350] should vote either way, nor be influenced in so voting for the single reason that a majority of the jurors are in favor of such a vote. On other words, you should not surrender your honest conviction concerning the effect or weight of the evidence, or the guilt or innocence of the defendant, for the mere purpose

of returning a verdict, or solely because of the opinion of other jurors.

The final test of the quality of your service will lie in the verdict which you return to this court room, and not in the opinions which any of you may hold as you leave the jury box.

Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. And to that end the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and the declaration of the truth.

Remember that you are not partisans or advocates; now you are judges.

The Clerk has prepared a form of verdict. You will retire to the jury room and you will select one of your members as foreman. After you have reached a verdict you will fill in the blank— [351] when all twelve of you have arrived at a verdict you will fill in the blank spaces provided on the form, and date it and sign it and you will return it to the court room. You will remember that when you are deliberating you will be required to be kept together. It will not be permissible for any person to speak to you or for you to speak to any other person except to me, the Judge, and then only through the bailiff.

The Clerk will swear the bailiff.

The Clerk: Your Honor, the bailiffs both have been sworn.

The Court: Have they? Are there any further exceptions?

Mr. Thurman: None from the Government.

Mr. Choisser: No exceptions.

The Court: Well, I suppose that it may be stipulated that the motion that counsel stated in chambers——

Mr. Choisser: Yes.

Mr. Thurman: Yes, sir.

The Court: May be deemed to have been made.

Mr. Choisser: Yes, sir.

The Court: And at the time denied. Very well, you will retire to the jury room. If you [352] have not arrived at a verdict by 12:30, I will send you to lunch.

(Thereupon the jury retired to the jury room to deliberate on its verdict at 12 o'clock noon of the same day.) [353]

Reporter's Certificate

I hereby certify that that portion of the proceedings contained in the foregoing typewritten pages numbered 1 to 228 and 272 to 353, both inclusive, is fully and accurately contained in the shorthand record made by me at the trial of the above-entitled cause, and that said typewritten pages constitute a full, true, and accurate transcript thereof, and the whole thereof.

Dated Phoenix, Arizona, this, the 15th day of December, 1951.

/s/ LOUIS L. BILLAR,
Official Court Reporter.

Reporter's Certificate

I hereby certify that that portion of the proceedings contained in the foregoing typewritten pages numbered 229 to 271, both inclusive, is fully and accurately contained in the shorthand record made by me at the trial of the above-entitled cause, and that said typewritten pages constitute a full, true, and accurate transcript thereof, and the whole thereof.

Dated Phoenix, Arizona, this, the 12th day of December, 1951.

/s/ JOSEPH T. MORGAN,
Official Court Reporter.

[Endorsed]: Filed Jan. 21, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Claude E. Spriggs, Defendant, numbered C-9558 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, constitute the record on appeal in said case as designated in the Appellant's Designation and in the Appellee's Designation filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Indictment.
2. Bill of Particulars (which was not designated).
3. Plea of not guilty (Minute entry of June 18, 1951, which was not designated).
4. Proceedings of Trial (Minute entry of November 14, 1951).
5. Further Proceedings of Trial, including Deft's Oral Motion for Judgment of Acquittal as to Count 3 and Order denying said motion (Minute entry of November 15, 1951).
6. Further Proceedings of Trial, including return of verdict (Minute entry of November 16, 1951).
7. Exhibits in Evidence, to wit: Government's Exhibits 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 17, 21, 28, 33 and 34; and Defendant's Exhibits A and B.

8. Verdict.

9. Reporter's Transcript of Evidence.

10. Motion for Judgment of Acquittal notwithstanding the Verdict (which was not designated).

11. Motion for New Trial.

12. Order denying Defendant's Motion for New Trial and Motion for Judgment of Acquittal Notwithstanding the Verdict (Minute entry of November 19, 1951).

13. Judgment.

14. Notice of Appeal.

15. Statement of Points upon Which Defendant Intends to Rely Upon Appeal.

16. Appellant's Designation of Record on Appeal.

17. Appellee's Designation of Record on Appeal.

18. Order Extending Time to Docket Appeal (Minute entry of December 21, 1951).

19. Order Extending Time to Docket Appeal (Minute entry of January 25, 1952).

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of $5.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 13th day of February, 1952.

/s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 13258. United States Court of Appeals for the Ninth Circuit. Claude E. Spriggs, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed February 15, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13258

CLAUDE E. SPRIGGS,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

STIPULATION

It Is Hereby Stipulated between W. T. Choisser, attorney for the appellant, Claude E. Spriggs, and Frank E. Flynn, United States Attorney for the District of Arizona, attorney for the appellee, that the testimony of the following witnesses may be deleted from the Reporter's Transcript in the printing of the Abstract of the Record:

Robert R. Weaver	Bill McBride
Wilburn Brown	Kemper P. Mauzy
Kent B. Pomeroy	Thomas S. Krone
Stuart M. Bailey	Stephen B. Rayburn
Otis Sasser	H. M. Vanderberg
Jessie Gomez	Harry C. Jones
Vernon Householder	Victor H. Pulis
Helen Pitman	Fred O. Wilson

Dated at Phoenix, Arizona, this 19th day of March, 1952.

/s/ W. T. CHOISSER,
Attorney for Appellant.

FRANK E. FLYNN,
United States Attorney for the District of Arizona,
Attorney for Appellee.

[Endorsed]: Filed March 20, 1952.

No. 13,258

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

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No. 13,258

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

JURISDICTIONAL MATTERS

In the United States District Court for the District of Arizona, Honorable Peirson M. Hall, United States District Judge, specially assigned, presiding, the appellant Claude E. Spriggs, was on the 19th day of November, 1951, adjudged guilty of the offense of violating Title 26, United States Code, Paragraph 145(b) (attempt to defeat

and evade income tax) upon Count III of the Indictment (T.R. 22-23); and thereafter, and on the 21st day of November, 1951, the appellant filed his notice of appeal to this Court (T.R. 24) from the judgment of conviction entered on November 19, 1951, and from the order denying his motion for judgment of acquittal notwithstanding the verdict entered on November 19, 1951, and from the order denying motion for new trial denied November 19, 1951 (T.R. 24), and from the judgment and sentencing made and entered herein on November 19, 1951, and from the whole thereof (T.R. 24).

The District Court has jurisdiction under Title 26, United States Code, Paragraph 145(b) (attempt to defeat and evade income tax); this court has jurisdiction under Title 28, United States Code, Paragraph 1291.

STATEMENT OF FACTS

The appellant herein was indicted on three Counts (T.R. 3, 4 and 5). In due time appellant moved for and received a Bill of Particulars concerning each Count of said Indictment (T.R. 5, 6, 7 and 8). Thereafter, on June 18, 1951, appellant entered a plea of not guilty (T.R. 9) and the cause was set for trial on the 13th day of November, 1951 (T.R. 9); and the same proceeded to trial on the 14th day of November, 1951 (T.R. 9), and upon trial the defendant was acquitted of Counts I and II of said Indictment, upon his motion for a directed verdict of acquittal (T.R. 165) and (T.R. 172) and upon portions of Count III relating to the items set forth in (a) and (b) in the Government's response for a Bill of Particulars (T.R. 8) and (T.R. 172-173); leaving only for consideration of the jury (T.R. 176) the allegations contained in the Government's

response to defendants' motion for a Bill of Particulars, the item consisting of:

> "Depreciation overstated:
>
> This item consists of the overstatement of depreciation by the defendant as the result of his having falsely represented the cost of his property located on Henshaw Road, Phoenix, Arizona, on which he claimed excessive depreciation in the amount of.....$2,978.60" (T.R. 8)

to support Count III of the Indictment herein (T.R. 4-5). At the close of the evidence, presented by the Government, the defendant moved for judgment of acquittal as to Count III in the Indictment, upon the ground and for the reasons that the evidence adduced did not sustain the allegations of said Count III of said Indictment (T.R. 172) which said motion, after being granted as to items A and B (T.R. 172-173), as heretofore set out, was denied as to Count III of the Indictment as to the matter set out in "Depreciation overstated" as shown in the Government's response to defendant's motion for a Bill of Particulars (T.R. 8 and 174). The cause was submitted to the jury, and the Jury thereafter returned a verdict of guilty as to Count III (T.R. 18-19). In due time, appellant filed his Motion for Judgment of Acquittal Notwithstanding the Verdict (T.R. 19) and his Motion for a New Trial (T.R. 20); both were denied by the Court on November 19, 1951 (T.R. 21). The appellant was, on November 19, 1951, adjudged guilty of the offense of violating Title 26, Section 145(b) United States Code (attempt to defeat and evade income tax), as alleged in Count III of the Indictment, and was thereafter sentenced therefor (T.R. 22-23).

The Government's case and evidence thereon rested solely on the testimony of two Internal Revenue Agents, to-wit: Arthur R. Beals and Lloyd M. Tucker. No other evidence or exhibits were adduced before the jury with the exception of appellant's income tax return for the year in question, to-wit: 1947 (T.R. 10). Testimony of the said agents concerning the allegations as covered by the Government's Bill of Particulars as to Count III, consisted solely of the following (T.R. 8)

> Depreciation overstated:
>
> "This item consists of the overstatement of depreciation by the defendant as the result of his having falsely represented the cost of his property located on Henshaw Road, Phoenix, Arizona, on which he claimed excessive depreciation in the amount of.....$2,978.60"

which was derived solely from admissions, conversations and statements with the appellant (concerning the so-called Henshaw Road property) (T.R. 50-72 and 83-144). (It will be noted that much of this evidence was to Counts of Indictments dismissed by the lower courts, leaving only for consideration by the jury the item of "Depreciation overstated" as herein set forth by the Government's Bill of Particulars in Count III of the Indictment (T.R. 176).

The witness Beals testified relating to the Henshaw Road property as follows (T.R. 93):

> "The Court: Well, did you have any discussions with him concerning the depreciation on the Henshaw Road Property?
>
> A. Yes sir.
>
> Q. When and where, and who was present?
>
> A. At this same time.
>
> Q. All right, what was said?"

The witness then related conversations with the appellant supposedly concerning Count III of the Indictment for some thirty pages of the Transcript of Record (T.R. 93-120).

As to the fact that the Government's evidence consisted solely upon admission and statements of the appellant, we refer to the following:

> "Q. (By Mr. Choisser): Now, anything else that you know of that makes up that item of property, that I haven't asked you about?
>
> A. No, I don't—I didn't actually go into these buildings. I took Mr. Spriggs' * * *" (T.R. 120).
>
> Question by Mr. Thurman (T.R. 120):
>
> "Q. Do you know what was on that property in any of those years I have mentioned, of your own knowledge?
>
> A. No, I do not."

The other Government witness, Lloyd M. Tucker, testified solely to conversations with the appellant (T.R. 121-144) and during this testimony Government Exhibit 33 (T.R. 129) and Government Exhibit 34 (T.R. 140) were marked in evidence, which were written reports of conversations had with the defendant subsequent to the date laid in the Indictment.

The Government attempted to prove income by certain net worth statements which were introduced in evidence as Government Exhibits 29, 30, 31 and 32 (T.R. 110) *but were subsequently rejected as competent evidence* by the Court and ordered removed from the evidence by the Court thereupon sustaining an objection to said Government Exhibits 29, 30, 31 and 32 (T.R. 115, 116), and thereby removing them from consideration by the jury.

The relating of statements, admissions and conversations with the appellant by these agents was raised by the appellant by the following objections (T.R. 124):

> "* * * For the record, may we interpose the objection that there has been no showing of any crime having been committed, no connection with the defendant therewith, and therefore any statement or admission or whatever he might have said is not admissible at this time. There has been no corpus delicti, proved, there has been no connection of the defendant with it, therefore, his statements are inadmissible at this time until that is shown."

which objection was overruled by the Court (T.R. 125).

There being no other evidence adduced except as to these conversations, statements and admissions between witness and appellant bfeore the Court as to the aforementioned item of depreciation as relating to Count III of the Indictment, the cause was thereupon submitted to the Jury.

ISSUE INVOLVED

The issue involved on this appeal relating to items of Depreciation as set forth in the Government's Bill of Particulars, as supporting Count III of the Indictment is (1) Is the evidence sufficient to sustain the verdict and judgment? This was raised by appellant's objection to the evidence (T.R. 124), appellant's motion for judgment of acquittal as to Count III of the Indictment (T.R. 172 and 177) and by motion for Judgment of Acquittal Notwithstanding the Verdict (T.R. 19).

SPECIFICATIONS OF ERROR

I.

The District Court erred in admitting the testimony over the objection of appellent (T.R. 124) of such witnesses' testimony of related conversations, admissions and statements, for this testimony was inadmissible for the reason there had been no showing of any crime having been committed (T.R. 124): "There has been no corpus delicti proved, there has been no connection of the defendant with it, therefore, his statements are inadmissible at this time until that is shown."

II.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal at the end of the Government's case (T.R. 174) and at the end of all of the evidence adduced before the Jury (T.R. 177); upon the ground that the evidence was insufficient to sustain a conviction.

III.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal notwithstanding the verdict (T.R. 21) upon the ground that the evidence was insufficient to sustain the verdict.

IV.

The District Court erred in refusing to grant appellant's motion for a new trial (T.R. 21) upon the ground that the evidence was insufficient to sustain a conviction.

ARGUMENT

I.

The District Court erred in admitting the testimony over the objections of appellant, of Government agents' related conversations, admissions and statements, for the reason said testimony was inadmissible upon the ground there had been no showing of any crime having been committed.

A. An extrajudicial confession will not be admitted unless corroborated by other evidence. In the case of *Tabor v. U. S.*, 152 F.(2) 254, the Court said:

> "* * * it may be said that the rule in this country, in all federal courts which have considered the question, has universally been that an extrajudicial confession will not be admitted unless corroborated by other evidence. The cases differ widely as to the extent of such evidence required and rules on this point have been variously stated. In most cases, it has been required that the evidence concern the corpus delicti and some cases require that it touch every element thereof, but the diversity of these cases does not lend itself to the statement of any general rule. Only a few cases have allowed such confessions to be admitted where the extraneous proof did not definitely touch the corpus delecti and these cases may be considered somewhat ambiguous under their special facts.
>
> There was no corroborated evidence in the present case that would justify the admission of the confession under any of the rules laid down by the various courts and the trial judge should have granted the motion for a directed verdict on the indictment. * * *"

From a careful review of the testimony adduced in this case it shows conclusively that the entire Government's

evidence was predicated upon the two Government Agents relating alleged confessions; admission and conversations with the appellant and no other evidence was adduced before the jury, by the Government in support of the allegations of Count III of the Indictment, as further limited and set forth in the Government's Bill of Particulars.

II.

A. The District Court erred in refusing to grant appellant's motion for judgment of acquittal at the end of the Government's case, and at the end of all of the evidence adduced before the Jury; upon the ground that the evidence was insufficient to sustain a conviction.

B. The District Court erred in refusing to grant appellant's motion for judgment of acquittal notwithstanding the verdict upon the ground that the evidence was insufficient to sustain the verdict.

C. The District Court erred in refusing to grant appellant's motion for a new trial upon the ground that the evidence was insufficient to sustain a conviction.

(In order to save space the following argument pertains to the assignments of error, A, B, C, above.)

The evidence is not sufficient to support a verdict and judgment of guilty of violation of Title 26, United States Code, 145(b) (attempt to defeat and evade income tax) in the sum of $1,058.03, as charged in Count III of the Indictment herein and as limited to "Depreciation overstated" (T.R. 8) ($2,978.60) as contained in the Government's Bill of Particulars.

A careful examination of the transcript will reveal no evidence whatsoever by any competent testimony or other

evidence of any income whatsoever received by the appellant for the calendar year 1947, as alleged in Count III of the Indictment herein.

The Government relied solely upon statements of the appellant as to depreciation taken upon the property in question, to-wit: that property known as the Henshaw Road property, and as set forth in the Government's Bill of Particulars and which was the remaining issue in the trial below, and for consideration before this Court on appeal. The Government attempted to prove by financial statements the income of the appellant (T.R. 110) but the Court withdrew these statements from the evidence (T.R. 116) leaving nothing in evidence before the Court and Jury except the statements of the appellant herein, uncorroborated in any manner whatsoever and which is insufficient to sustain a conviction.

A universal and existing rule is that one may not be convicted of a crime upon his uncorroborated extrajudicial confession. *Forte v. U. S.,* 127 A.L.R. 1120, and all Annotations thereunder.

To sustain a conviction there must be some evidence of corpus delicti independent of alleged extrajudicial confession and admissions of defendant.

The rule in this country in all Federal Courts which have considered the question, have been universally held that all extrajudicial confession will not be admitted unless corroborated by other evidence, *Tabor v. U. S.,* 152 Fed.(2) 254, and the same argument precisely obtains in the present case which can be quoted from the case above:

> "There was no corroborated evidence in the present case that would justify the admission of the confession under any of the rules laid down by the various courts

and the trial judge should have granted the motion for a directed verdict on the indictment * * *"

In reversing this case the appellate Court declared:

"There was no sufficient independent evidence in either case to corroborate the confession. In view of our conclusions as to the failure of proof to corroborate the confession it is not necessary to consider the question raised as to whether the confession was obtained under duress."

There was not sufficient evidence in either of these cases to sustain a conviction which is the exact grounds relied upon by appellant in the instant case. The same rule is adhered to in *U. S. v. Yost,* 157 Fed.(2) 147.

In the consideration of an income tax evasion case dealing with the insufficiency of evidence to sustain the conviction the Court said:

"In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. Pines v. United States, 8 Cir., 123 F. 2d 825, 829; Forte v. United States, 68 App. D.C. 111, 94 F.2d 236, 243, 127 A.L.R. 1120; Gordnier v. United States, 9 Cir., 261 F. 910, 912; United States v. Chapman, 7 Cir., 168 F.2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case,' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict." We fully agree with his statement of the law.' In other words

to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant that defendant evaded some income tax. Gleckman v. United States, 8 Cir., 80 F.2d 394, 399; United States v. Miro, 2 Cir., 60 F.2d 58, 61; O'Brien v. United States, 7 Cir., 51 F.2d 193, 196." * * *

United States v. Fenwick, 177 F.2d 448.

The Court in *Bryan v. U. S.,* 175 F.(2) 223, laid down the following rule:

"The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

and since none was introduced or presented by the Government in the instant case, it follows that under the evidence herein a conviction cannot be allowed to stand against appellant.

In *Tabor v. U. S.,* 152 Fed.(2) 254, the Court in that case laid down the rule that:

"The necessity for independent corroboration of a confession, of the character of the one here or as to the admissions made after the crime, is clearly recognized by the Supreme Court of the United States in the case of Warszower v. United States, 312 U.S. 342, 61 S.Ct. 603, 85 L.Ed. 876."

The Court further said in the *Tabor* case:

"* * * Aside from the confession, there is no evidence that defendant ever knew, met or saw Ruby or had any connection with him. It is not even shown that Ruby was at the Induction center on the day defend-

ant was examined. 'A conviction of conspiracy may not be sustained solely on an admission, or confession, of the accused unless such admission or confession is corroborated by independent evidence of the corpus delicti'."

The Court in the case of *Yost v. United States,* 157 Fed. (2d) 147, on page 150 stated:

"For nothing is better established than that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and certainly the corroboration in this case, given its broadest import, wholly fails to include any substantial evidence of the corpus delicti. If in this case there were independently of the confession, substantial evidence of the corpus delicti, or if it were shown that such evidence and the confession were together convincing beyond a reasonable doubt, the verdict of the jury and the judgment of the court below would have to stand. But in the present case, exclusive of the 'statement,' there is not a word of effective evidence, direct or circumstantial, from which any jury could properly conclude that there was an unlawful combination, confederacy, agreement or conspiracy between appellant and Ruby to cause appellant's rejection when he answered the call for induction into the military service."

These holdings were again made in *Forte v. U. S.,* 127 A.L.R. 1120, and in the extensive annotations thereto, where it was expressly held one cannot be convicted of a crime upon his uncorroborated extrajudicial confession.

Further sustaining the law as outlined heretofore the District Court of the United States, Atlanta Division, in the case of *United States v. Berman,* 75 Fed. Supp. 789, observes the following:

> "In the prosecution for fraudulent evasion of income tax the Government was required to prove beyond a reasonable doubt items which it claimed were properly chargeable to income constituted taxable income and that failure to return them was willful."

The Court further found that each case must rest upon the *actual facts,* and that without competent evidence to sustain the verdict a motion for judgment of acquittal should have been granted and that the burden rested upon the Government to prove that items charged to the defendant were in fact taxable income and must be shown by competent evidence to be such.

In consideration of all the evidence presented to the trial court, as revealed by the transcript, and the law as applicable thereto, and presented herein, it therefore follows that appellants' conviction cannot stand under the state of the evidence adduced, and the law pertaining to the subject.

It must therefore be concluded there was no competent evidence upon which the Jury could find the appellant guilty of an attempt to defeat and evade income tax as alleged in Count III of the Indictment herein.

CONCLUSION

It is respectfully submitted, in view of the foregoing, that this Honorable Court should reverse the judgment of the District Court and order appellant's motion for judgment of acquittal of Count III granted, or in the alternative order that a new trial be granted.

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Attorney for Appellant

No. 13258

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Court of Appeals
For the Ninth Circuit

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vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
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BRIEF FOR APPELLEE

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E. R. THURMAN,
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Attorneys for Appellee.

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No. 13258

IN THE

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CLAUDE E. SPRIGGS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPELLEE'S OPENING BRIEF

JURISDICTIONAL MATTERS

Appellant, in his brief, has correctly stated the jurisdictional matters, and appellee agrees that the District Court had jurisdiction under Title 26 U.S.C.A., Paragraph 145(b), and this Court has jurisdiction under Title 28 U.S.C.A., Section 1291.

STATEMENT OF FACTS

The appellee agrees generally with the Statement of Facts as set forth in Appellant's Brief (App. B. 2-6), with the exception of the statement found at the top of page 4 of Appellant's Brief, wherein he states:

> "The Government's case and evidence thereon rested solely on the testimony of two Internal Revenue Agents, to-wit: Arthur R. Beals and

Lloyd M. Tucker. No other evidence or exhibits were adduced before the jury with the exception of appellant's income tax return for the year in question, to-wit: 1947 (T.R. 10). Testimony of the said agents concerning the allegations as covered by the government's Bill of Particulars as to Count III * * * which was derived solely from admissions, conversations and statements with the appellant (concerning the so-called Henshaw Road property) (T.R. 50-72 and 83-144)."

Appellee disagrees with said statement of appellant and calls attention to the fact that, in addition to the 1947 income tax return of appellant, two other income tax returns of the appellant were introduced in evidence, to-wit, appellant's income tax returns for the years 1944 and 1946 (T.R. 43-44), as well as the testimony of the Government witness, James A. Struckmeyer (T.R. 73-78), who testified in substance that all of the conversation that he had with appellant was that Struckmeyer was a damn fool to pay a tax, and that appellant didn't pay a tax, and there was no reason why the witness should (T.R. 76); and also the testimony of Marjorie Ross (T.R. 78-82). This witness testified in substance that she had heard Mr. Spriggs discuss income tax matters on occasions in the office of Mr. Struckmeyer at Phoenix, Arizona, and that during those conversations appellant stated that they did not have to be paid if you knew how to make your income tax return (T.R. 79, 80).

ISSUE INVOLVED

The issue involved on this appeal relating to items of Depreciation as set forth in the Government's Bill of Particulars, as supporting Count III of the Indictment is (1) Is the evidence sufficient to sustain the verdict

and judgment? This was raised by appellant's objection to the evidence (T.R. 124), appellant's motion for judgment of acquittal as to Count III of the Indictment (T.R. 172 and 177) and by motion for Judgment of Acquittal Notwithstanding the Verdict (T.R. 19). (App. B. 6).

SPECIFICATIONS OF ERROR

The appellant has set forth the following specifications of error in his brief (App. B. 7):

I.

The District Court erred in admitting the testimony over the objection of appellant (T.R. 124) of such witnesses' testimony of related conversations, admissions and statements, for this testimony was inadmissible for the reason there had been no showing of any crime haping been committed (T.R. 124): "There has been no corpus deliciti proved, there has been no connection of the defendant with it, therefore, his statements are inadmissible at this time until that is shown."

II.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal at the end of the Government's case (T.R. 174) and at the end of all of the evidence adduced before the Jury (T.R. 177); upon the ground that the evidence was insufficient to sustain a conviction.

III.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal notwithstanding the verdict (T.R. 21) upon the ground that the evidence was insufficient to sustain the verdict.

IV.

The District Court erred in refusing to grant appellant's motion for a new trial (T.R. 21) upon

the ground that the evidence was insufficient to sustain a conviction.

ARGUMENT

While appellant has set forth four specifications of error, it is obvious that there is only one issue involved, and that is in order to sustain the conviction there must be some evidence of corpus delicti independent of the alleged extrajudicial confessions and admissions of appellant, and appellee will confine his argument to that issue and Specification of Error No. I.

In analyzing the evidence which appellee believes sustains its position in this case that the Court committed no error in admitting the testimony of the Government's witnesses relating to the conversations, admissions and statements of the appellant, we believe that it is proper to call attention to the testimony of Government witness Arthur R. Beals (T.R. 93-96), wherein Mr. Beals testified as follows:

> "A. He identified the item in the depreciation schedule as cement, 1945, as being the Henshaw Road property, and when I inquired as to the cost which is listed there as $20,000.00, he stated that he didn't have detailed records of that, the cost of that property, but that it cost him at least that much and it was in the process of construction; he had purchased the propery and he went into the hole on that, that he had acquired it for a cost, oh, as I recall, it was $2,750.00, and at the time there were, I think, two rentals on it, two units. One was in condition for renting and the other, I believe was a garage, I am not just certain as to that, but, at least, this property had been acquired in '45 * * *" (T.R. 93-94)

"A. He stated that the property had been acquired in '45 and that through the year '46 he had made various additions to this property, and that as of the end of '46 he felt that he had invested in this property $20,000.00—a total of $20,000.00. I further asked Mr. Spriggs to account for the large investment in property as indicated on this return, noting that earlier returns had—" (T.R. 94)

"A. Yes. I have two items listed on the '47 return; one acquired in '45, Henshaw, $20,000.00, and another 'cement' listed at $20,000.00 and he stated, or he said that both of those items were Henshaw Road property, that the second $20,000.00 item there represented investment, additional investment which he had made in the year '46 making a total of $40,000.00 in the Henshaw Road property at the end of '40—

"The Court (Interrupting): 6.

"A. '47. This was the '47 return which listed the two items of $20,000.00, making a total of $40,000.00 in the Henshaw Road property as of the end of '47. Now, Mr. Spriggs, toward the end of our discussion and after I had stated to him that at the end of '47 his investments there had increased something like over $60,000.00, I asked him where the funds, or rather, he, through our discussion, he made the statement, well, he says, 'You are going to ask me where I got that money?', and I said, 'You are right, Mr. Spriggs; where did you get that money?,' and he said, 'Well, look at my returns; it is all on there,' but I searched the return and could not find it." (T.R. 96)

An analysis of Mr. Beal's testimony above set forth shows conclusively that the statements of appellant are certainly not admissions of guilt or confessions made by appellant to Mr. Beals, but are merely statements

showing knowledge pertinent to the issue of guilt and may be considered because the statements were for a purpose of appellant's own rather than an admission, for they say, in substance, that there is nothing wrong with appellant's income tax returns as everything is reflected therein.

If appellee is correct in its analysis of this evidence, certainly it would be considered proper to go to the jury, and would be an addition and tend to prove the corpus delicit. In support thereof we cite

Gros v. United States,
138 Fed. 2nd 260, at 262 (9th Cir.)

The 1947 income tax return cannot, alone, be considered evidence in support of the proof of the corpus delicti. However, when taken into consideration with the appellant's income tax return for 1946, Schedule F, Explanation of Deduction and Depreciation, we find that the Henshaw Road property therein, under item 3, Cost, is set forth as $20,000.00 with the depreciation allowable under item 9 entered as $1750.00, and then referring to the like schedule in appellant's 1947 income tax return, we find the same property is placed down twice in item 3, Cost, in items of $20,000.00 each, making a total of $40,000.00, and the depreciation entered under item 9 on said property in the amount of two figures of $2,000.00 each, or making a total of $4,000.00, and then considering the small amount of income set forth in the two respective income tax returns, all of which certainly lays a basis to cause one to question the truth of the figures on depreciation. This may be slight evidence, but evidence it is, and tends to establish the corpus delicti separate and distinct from any statements or so-called admissions or confessions made by

the appellant to the officers of the Internal Revenue department.

The Government takes the position that it was necessary for it to prove beyond a reasonable doubt the wilfullness of the appellant to defeat and evade a part of his income tax for the year 1947, and this was done by the introduction of the evidence of the Government witnesses James A. Struckmeyer (T.R. 73-77) and Marjorie Ross (T.R. 78-80), and approved by the trial court (T.R. 75).

Counsel for appellee at this point believes it advisable to call the attention of this Honorable Court to the testimony of Mr. Tucker, commencing about the middle of page 136 of the Transcript of Record and continuing to the top of page 137, as follows:

> "A. I asked Mr. Spriggs if the facts contained on that statement were not correct, and he stated that his increase in net worth was too high, so I questioned him with respect to each of the items contained on that statement, the assets, the depreciable assets, and the liabilities. He agreed that they were all correct with the exception of the cost which he had allocated to the Henshaw Road property. I stated that that was a matter which we had discussed on previous occasions and that up until that time we had been in agreement on it. I asked him why on that date that he stated that the cost which he had allocated to that property was not correct, and he stated—he said, 'Well,' he says, 'I will tell you exactly what happened.' He says, 'If you ever say that I told you, I will say you are a damn liar.' He said, 'When I went to file my'—he says, 'When I went to file my 1947 income tax return,' he said, 'I saw that I was going to have to pay some tax, so,' he says, 'I just added another $10,000 to the cost of it to put me in a no tax bracket.' "

Counsel for the Government does not believe that the statement made by appellant to Mr. Tucker, as set forth in the above testimony, is an admission of guilt, especially when he added to his statement, "If you ever say that I told you, I will say you are a damn liar." Certainly it is obvious that appellant did not at that time intend to be bound by any admission that he made, and, therefore, it certainly lacks the elements of a confession or an admission of guilt.

This Honorable Court has held that it is unnecessary to make full proof of the corpus delicti independently of the defendant's confession.

Wynkoop v. United States,
22 Fed. 2nd 799 (9th Cir.)
Wiggins v. United States,
64 Fed. 2nd 950 (9th Cir.)
Pearlman v. United States,
10 Fed. 2nd 460 (9th Cir.)

This Court has also further held that the corroborative evidence need not independently establish the corpus delicti beyond a reasonable doubt, and that it is sufficient if such evidence, when considered in connection with the confession or admission, satisfies the jury beyond a reasonable doubt that the offense was, in fact, committed.

Iva Ikuko Toguri D'Aquino v. United States
192 Fed. 2nd 338, at 357 (9th Cir.)

It is the position of the appellee that there was sufficient evidence of a corroborative nature when considered in connection with the statements, confessions or admissions of the appellant to satisfy the jury beyond a reasonable doubt that the offense charged in this case was, in fact, committed.

SUMMARY

1. The court did not err in admitting testimony of the Government's witnesses Arthur R. Beals and Lloyd M. Tucker which related to the conversations, admissions and statements of the appellant, for the reason that there was sufficient corroborative evidence of the corpus delicti as a foundation for its admissibility.

2. Appellant had a fair and impartial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

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United States Attorney,
District of Arizona

E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Appellee.

No. 13259

United States Court of Appeals

for the Ninth Circuit.

WOODARD LABORATORIES, INC., DEAN D. MURPHY and JOHN L. SULLIVAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13259

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

EUGENE M. ELSON,
541 S. Spring St.,
711 Spring Arcade Bldg.,
Los Angeles 13, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;

TOBIAS G. KLINGER,
Assistant U. S. Attorney,
600 U. S. Post Office & Court House Bldg.,
Los Angeles 12, Calif.

In the United States District Court for the Southern District of California, Central Division

No. 21770

UNITED STATES OF AMERICA

vs.

WOODARD LABORATORIES, INC., a Corporation and DEAN D. MURPHY and JOHN L. SULLIVAN, Individuals

INFORMATION

[21 U.S.C. 321(g)(2), 331(a), 333(a), 351(c), 352(a)]

Federal Food, Drug and Cosmetic Act

The United States Attorney charges:

Count One

[21 U.S.C. 321(g)(2), 331(a), 333(a), 351(c)]

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned, president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned, secretary and manager of said corporation, did, within the Central Division of the Southern District of California on or about August 22, 1949, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate

commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of large boxes, each large box containing three small boxes containing a number of tablets of a drug; [2*]

That displayed upon said large boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T. M. Reg.
Inc.
Laboratories
Estrocrine
90 Tablets
Woodard $4.00 Laboratories

Each tablet contains: 0.022 mg. alpha estradiol equal to 200 R.U. (Allen-Doisy) equivalent to 2000 International Estrone Units; with excipients added. See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.,
Los Angeles, California
1 1 1 Estrocrine 1 1 1

Directions

To be dispensed only by or on the prescription of a physician.

Precision Paperbox Company
San Gabriel, Calif.

Made in U. S. A. Lot No. 497567

*Page numbering appearing at foot of page of original Certified Transcript of Record.

That displayed upon said small boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Inc. Reg.
Laboratories
Estrocrine
30 Tablets

Each tablet contains: 0.022 mg. alpha estradiol equal [3] to 200 R. U. (Allen-Doisy) equivalent to 2000 International Estrone units; with excipients added.
See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California

Directions
To be dispensed only by or on the prescription of a physician.

Cat. No. 111 Lot No. 497567 Made in U. S. A.

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was adulterated within the meaning of 21 U.S.C. 351(c) in that its strength differed from that which it purported and was represented to possess in that each tablet of said drug was represented to contain 0.022 milligram of alpha estradiol whereas each tablet of said drug did not

contain 0.022 milligram of alpha estradiol but did contain less than that amount of alpha [4] estradiol.

Count Two

[21 U.S.C. 321(g)(2), 331(a), 333(a), 352(a)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California on or about August 22, 1949, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of boxes, each box containing a number of tablets of a drug;

That displayed upon said boxes was the labeling displayed upon the boxes described in the first count of this information, which said description in said first count is, by reference, hereby incorporated in this count;

That said drug, when caused to be introduced

and delivered for introduction into interstate commerce as aforesaid was misbranded within the meaning of 21 U.S.C. 352(a) in that the statement, to wit, "Each tablet contains: 0.022 mg. alpha estradiol * * *," displayed upon the boxes containing said tablets of drug as aforesaid, was false and misleading in this, that said statement represented and suggested that each tablet of said drug contained 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 miligram of alpha estradiol but did contain less than 0.022 milligram of alpha estradiol. [5]

Count Three

[21 U.S.C. 321(g)(2), 331(a), 333(a), 351(c)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, within the period from on or about January 20, 1950, to on or about January 24, 1950, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of Cali-

fornia, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of large boxes, each large box containing three small boxes containing a number of tablets of a drug;

That displayed upon said large boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Reg.
Inc.
Laboratories
Estrocrine
90 Tablets

Each tablet contains: 0.022 mg. alpha estradiol equal to 200 R.U. (Allen-Doisy) equivalent to 2000 International Estrone Units; with excipients added. See Back Panel. [6]

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California

1 1 1 Estrocrine 1 1 1

Directions

To be dispensed only by or on the prescription of a physician.

Woodard $4.00 Laboratories
Lot No. 897618 Made in U. S. A.

That displayed upon said small boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Reg.
Inc.
Laboratories
Estrocrine
30 Tablets

Each tablet contains: 0.022 mg. alpha estradiol equal to 200 R. U. (Allen-Doisy) equivalent to 2000 International Estrone units; with excipients added.

See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California

Directions

To be dispensed only by or on the prescription of a physician.

897618 Cat. No. 111 Lot No.
Made in U. S. A.

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was adulterated within the meaning of 21 U.S.C. 351(c) in that its strength differed [7] from that which it purported and was represented to possess in that each tablet of said drug was represented to contain 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than that amount of alpha estradiol. [8]

Count Four

[21 U.S.C. 321(g)(2), 331(a), 333(a), 352(a)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, within the period from on or about January 20, 1950, to on or about January 24, 1950, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of boxes each box containing a number of tablets of a drug;

That displayed upon said boxes was the labeling displayed upon the boxes described in the third count of this information, which said description in said third count is, by reference, hereby incorporated in this count;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was misbranded within the meaning of 21 U.S.C. 352(a) in that the statement,

to wit, "Each tablet contains: 0.022 mg. alpha estradiol * * *," displayed upon the boxes containing said tablets of drug as aforesaid, was false and misleading in this, that said statement represented and suggested that each tablet of said drug contained 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than 0.022 milligram of alpha estradiol. [9]

Count Five

[21 U.S.C. 321(g)(2), 331(a), 333(a), 351(c)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, within the period from on or about March 20, 1950, to on or about April 13, 1950, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of large boxes, each large box containing three small boxes containing a number of tablets of a drug;

That displayed upon said large boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Inc. Reg.
Laboratories
Estrocrine
90 Tablets

Each tablet contains:
0.022 mg. Alpha estradiol, with excipients added.
See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California
1 1 1 Estrocrine 1 1 1
Directions
Woodard $4.00 Laboratories

To be dispensed only by or on the prescription of a physician.

Lot No. 107694 Made in U. S. A.

That displayed upon said small boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Inc. Reg.
Estrocrine 30 Tablets

Each tablet contains: 0.022 mg. Alpha estradiol, with excipients added.
See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California

Directions
To be dispensed only by or on the prescription of a physician.

Cat. No. 111 Lot No. 107694
Made in U. S. A.

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was adulterated within the meaning of 21 U.S.C. 351(c) in that its strength differed from that which it purported and was represented to possess in that each tablet of said drug was represented to contain 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than that amount of alpha estradiol. [11]

Count Six

[21 U.S.C. 321(g)(2), 331(a), 333(a), 352(a)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D.

Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, within the period from on or about March 20, 1950, to on or about April 13, 1950, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of boxes, each box containing a number of tablets of a drug;

That displayed upon said boxes was the labeling displayed upon the boxes described in the fifth count of this information, which said description in said fifth count is, by reference, hereby incorporated in this count;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was misbranded within the meaning of 21 U.S.C. 352(a) in that the statement, to wit, "Each tablet contains 0.022 mg alpha estradiol * * *," displayed upon the boxes containing said tablets of drug as aforesaid, was false and misleading in this, that said statement represented and suggested that each tablet of said drug contained 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than 0.022 milligram of alpha estradiol. [12]

Count Seven

[21 U.S.C. 321(g)(2), 331(a), 333(a), 351(c)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, on or about July 12, 1949, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Dallas, State of Texas, consigned to Fred D. Herget, a number of large boxes, each large box containing three small boxes containing a number of tablets of a drug;

That displayed upon said large boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Inc. Reg.
Laboratories
Estrocrine
90 Tablets

Each tablet contains: 0.022 mg. alpha-estradiol, equal to 200 R.U. (Allen-Doisy) equivalent to 2000 International Estrone Units; with excipients added. See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California

1 1 1 Estrocrine 1 1 1

Directions
To be dispensed only by or on the prescription of a physician

Lot No. 497567 Made in U. S. A.
Woodard $4.00 Laboratories

That displayed upon said small boxes was certain labeling, to wit, the following printed and graphic matter:

Woodard
Prophylaxis W Therapeusis
T.M. Inc. Reg.
Laboratories
Estrocrine
30 Tablets

Each tablet contains: 0.022 mg. alpha estradiol equal to 200 R.U. (Allen-Doisy) equivalent to 2000 International Estrone units; with excipients added. See Back Panel.

Formulated and Packed By
Woodard Laboratories, Inc.
Los Angeles, California

Directions

To be dispensed only by or on the prescription of a physican.

Cat. No. 111 Lot No. 497567

Made in U. S. A.

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was adulterated within the meaning of 21 U.S.C. 351(c) in that its strength differed from that which it purported and was represented to possess in that each tablet of said drug was represented to contain 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than that amount of alpha estradiol. [14]

Count Eight

[21 U.S.C. 321(g)(2), 331(a), 333(a), 352(a)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, on or about July 12, 1949, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced

and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Dallas, State of Texas, consigned to Fred D. Herget, a number of boxes, each box containing a number of tablets of a drug;

That displayed upon said boxes was the labeling displayed upon the boxes described in the seventh count of this information, which said description in said seventh count is, by reference, hereby incorporated in this count;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was misbranded within the meaning of 21 U.S.C. 352(a) in that the statement, to wit, "Each tablet contains: 0.022 mg. alpha estradiol * * *," displayed upon the boxes containing said tablets of drug as aforesaid, was false and misleading in this, that said statement represented and suggested that each tablet of said drug contained 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than 0.022 milligram of alpha estradiol. [15]

Count Nine

[21 U.S.C. 321(g)(2), 331(a), 333(a), 351(c)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D.

Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, within the period from on or about May 15, 1950, to on or about May 25, 1950, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of boxes, each box containing a number of tablets of a drug;

That displayed upon said boxes was the labeling displayed upon the boxes described in the fifth count of this information, which said description in said fifth count is, by reference, hereby incorporated in this count;

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was adulterated within the meaning of 21 U.S.C. 351(c) in that its strength differed from that which it purported and was represented to possess in that each tablet of said drug was represented to contain 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than that amount of alpha estradiol. [16]

Count Ten

[21 U.S.C. 352(a)]

The United States Attorney further charges:

That Woodard Laboratories, Inc., a corporation, organized and existing under the laws of the State of California, and trading and doing business at Los Angeles, State of California, and Dean D. Murphy, an individual, at the time hereinafter mentioned president of said corporation, and John L. Sullivan, an individual, at the time hereinafter mentioned secretary and manager for said corporation, did, within the Central Division of the Southern District of California, within the period from on or about May 15, 1950, to on or about May 25, 1950, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Los Angeles, State of California, for delivery to Denver, State of Colorado, consigned to Woodard Laboratories of Colorado, a number of boxes, each box containing a number of tablets of a drug.

That displayed upon said boxes was the labeling displayed upon the boxes described in the fifth count of this information, which said description in said fifth count is, by reference, hereby incorporated in this count.

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid was misbranded within the meaning of 21 U.S.C. 352(a) in that the statement, to wit, "Each tablet contains: 0.022 mg. alpha estradiol

* * *," displayed upon the boxes containing said tablets of drug as aforesaid, was false and misleading in this, that said statement represented and suggested that each tablet of said drug contained 0.022 milligram of alpha estradiol whereas each tablet of said drug did not contain 0.022 milligram of alpha estradiol but did contain less than 0.022 milligram of alpha estradiol.

ERNEST A. TOLIN,
United States Attorney for the Southern District of California.

By /s/ ANGUS D. McEACHEN,
Assistant U. S. Attorney .

[Endorsed]: Filed May 8, 1951. [17]

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 21st day of May, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTES OF MAY 21, 1951

For arraignment and plea, V. N. Erickson, Assistant U. S. Attorney, appearing as counsel for

Government; defendants present on O/R with their counsel, Eugene M. Elson, Esq.; defendant Dean D. Murphy also appearing as president of defendant corporation, and authorized to plead for it.

Defendants state their true names are as set forth in Information, are informed they are entitled to jury trial and counsel; acknowledge receipt of copy of Information heretofore given them; and each defendant pleads not guilty to each of the ten counts.

Court orders cause continued to 10 a.m., June 25, 1951, for setting, pursuant to stipulation. [18]

[Title of District Court and Cause.]

WAIVER OF JURY

The above cause coming on regularly for trial, defendant being present with counsel, Eugene M. Elson, Esq., and the defendant being desirous of having the case tried before the Court without jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury.

Dated: June 25, 1951.

WOODARD LABORATORIES, INC.

/s/ DEAN D. MURPHY,
President, Defendant in Pro Per.

I have advised the defendant fully as to its rights and assure the Court that its request for a trial without a jury is understandingly made.

/s/ EUGENE M. ELSON,
Attorney for Defendant.

The United States Attorney consents that the request of the defendant be granted and that the trial proceed without a jury.

/s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney.

Approved:

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed June 25, 1951. [22]

[Title of District Court and Cause.]

WAIVER OF JURY

The above cause coming on regularly for trial, defendant being present with counsel, Eugene M. Elson, Esq., and the defendant being desirous of having the case tried before the Court without jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury.

Dated: June 25, 1951.

/s/ DEAN D. MURPHY,
Defendant in Pro Per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury is understandingly made.

/s/ EUGENE M. ELSON,
Attorney for Defendant.

The United States Attorney consents that the request of the defendant be granted and that the trial proceed without a jury.

/s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney.

Approved:

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed June 25, 1951. [23]

[Title of District Court and Cause.]

WAIVER OF JURY

The above cause coming on regularly for trial, defendant being present with counsel, Eugene M. Elson, Esq., and the defendant being desirous of having the case tried before the Court without jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury.

Dated: June 25, 1951.

/s/ JOHN L. SULLIVAN,
Defendant in Pro Per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury is understandingly made.

/s/ EUGENE M. ELSON,
Attorney for Defendant.

The United States Attorney consents that the request of the defendant be granted and that the trial proceed without a jury.

/s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney.

Approved:

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed June 25, 1951. [24]

[Title of District Court and Cause.]

STIPULATION

It is hereby Stipulated between counsel for the respective parties in the above-entitled action, as follows:

1. That the depositions of H. Rosenzweig, R. L. Forman and Elisabeth Adam may be taken by counsel for defendants on July 11, 1951, commencing at the hour of 10:00 o'clock a.m. thereof and in consecutive order, and if not completed on said day the taking thereof may be continued from day to day until all of said depositions are completed.

2. That said depositions, and each of them, may be used by defendants at the trial of the above-entitled action with the same force and effect as though said deponents, and each of them, were actually present at said trial and testified accordingly.

3. That all objections, except as to the form of questions propounded at the taking of said depositions, may be reserved until the time of trial. [25]

4. That said depositions may be taken before any authorized Notary Public in and for the City of New York, who may also act as the reporter thereof, and that said depositions shall be taken at the offices of Liebowitz, Cobert & Deixel, attorneys at law, 50 Broad Street, New York, New York.

Dated this 25th day of June, 1951.

ERNEST A. TOLIN,
U. S. Attorney for the Southern District of California;

By /s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney, Attorneys for the United States of America, Plaintiff.

/s/ EUGENE M. ELSON,
Attorney for Woodard Laboratories, Inc., Dean D. Murphy and John L. Sullivan, Defendants.

It is so Ordered this 25th day of June, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed June 25, 1951. [26]

United States District Court, Southern District of California, Central Division

[Title of Cause.]

MINUTES OF THE COURT: TRIAL
Nov. 8, 1951

Present: The Honorable Wm. M. Byrne,
District Judge.

Proceedings:

The following witnesses are sworn and testify on behalf of:

Government: Jonas Carol, htf swn,

Defendant: Don C. Atkins, C. E. P. Jeffrys, John L. Sullivan, Robert E. Hoyt, Harry Sobel.

(Defendants rest.)

Defendants allowed to reopen the case on order of Court. Deposition of Elizabeth Adams Weiss is read into the record by counsel.

The following exhibits are admitted into evidence:

Government: 2,

Defendant: I.

It Is Ordered cause is submitted.

Court Finds each defendant guilty to counts 1, 3, 5, 7, and 9, and not guilty to counts 2, 4, 6, 8 and 10 and orders cause continued to Nov. 26, 1951, 2 p.m., for sentence.

EDMUND L. SMITH,
Clerk. [27]

United States District Court for the Southern District of California, Central Division

No. 21770—Criminal

UNITED STATES OF AMERICA

vs.

WOODARD LABORATORIES, INC., a Corporation.

JUDGMENT AND COMMITMENT

On this third day of December, 1951, came the attorney for the government and the defendant appeared in person and by its attorney, Eugene M. Elson,

It Is Adjudged that the defendant has been convicted upon its plea of Not Guilty, to Counts 1 through 10, inclusive, and a Finding of Guilty as to Counts 1, 3, 5, 7 and 9, of the offense of on or about August 22, 1949, violation of the Federal Food, Drug and Cosmetic Act, Title 21, Sec. 321(g)(2), 331(a), 333(a), 351(c) and 352(a), as charged in the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00 on each of Counts 1, 3, 5, 7 and 9, total fine $2500.00

It Is Adjudged That a stay of execution be granted to and including 12/5/51, at 4 p.m.; it is further ordered that in the event a Notice of Appeal is filed, execution of the judgment shall be stayed by deposit in the Registry of the Court of cash or bond in the amount of the judgment.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. M. BYRNE,
United States District Judge.

EDMUND L. SMITH,
Clerk.

[Endorsed]: Filed December 3, 1951. [28]

United States District Court for the Southern District of California, Central Division
No. 21770—Criminal

UNITED STATES OF AMERICA

vs.

DEAN D. MURPHY

JUDGMENT AND COMMITMENT

On this third day of December, 1951, came the attorney for the government and the defendant appeared in person and by his attorney, Eugene M. Elson,

It Is Adjudged that the defendant has been con-

victed upon his plea of Not Guilty to Counts 1 through 10, inclusive, and a Finding of Guilty as to Counts 1, 3, 5, 7 and 9 of the offense of on or about August 22, 1949, violation of the Federal Food, Drug and Cosmetic Act, Title 21, Sec. 321(g)(2), 331(a), 333(a), 351(c) and 352(a), as charged in the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $50.00 on each of Counts 1, 3, 5, 7 and 9, total fine $250.00.

It Is Adjudged That a stay of execution be granted to and including 12/5/51, at 4 p.m.; it is further ordered that in the event a Notice of Appeal is filed, execution of the judgment shall be stayed by deposit in the Registry of the Court of cash or bond in the amount of the judgment.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. M. BYRNE,
United States District Judge.

EDMUND L. SMITH,
Clerk.

[Endorsed]: Filed December 3, 1951. [29]

United States District Court for the Southern District of California, Central Division

No. 21770—Criminal

UNITED STATES OF AMERICA

vs.

JOHN L. SULLIVAN.

JUDGMENT AND COMMITMENT

On this third day of December, 1951, came the attorney for the government and the defendant appeared in person and by his attorney, Eugene M. Elson,

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty to Counts 1 through 10, inclusive, and a Finding of Guilty as to Counts 1, 3, 5, 7 and 9 of the offense of on or about August 22, 1949, violation of the Federal Food, Drug and Cosmetic Act, Title 21, Sec. 321(g)(2), 331(a); 333(a), 351(c), and 352(a), as charged in the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $50.00 on each of Counts 1, 3, 5, 7 and 9, total fine $250.00.

It Is Adjudged That a stay of execution be

granted to and including 12/5/51, at 4 p.m.; it is further ordered that in the event a Notice of Appeal is filed, execution of the judgment shall be stayed by deposit in the Registry of the Court of cash or bond in the amount of the judgment.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed December 3, 1951. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Names and Addresses of Appellants:

Woodard Laboratories, Inc., a Corporation,
Dean D. Murphy, and
John L. Sullivan, Individuals,
2308 West Seventh Street,
Los Angeles 5, California.

Name and Address of Appellants' Attorney:

Eugene M. Elson,
541 South Spring Street,
711 Spring Arcade Building,
Los Angeles 13, California.

Offense:

Violation of Federal Food, Drug and Cosmetic Act, 21 U.S.C. 351(c).

Concise Statement of Judgment or Order, Giving Date and Any Sentence:

Judgment entered December 3, 1951, finding defendants, and each of them, guilty as charged in Counts I, III, V, VII and IX of the [31] Information.

Sentence:

That the defendant corporation pay a fine of $500.00 on each of said Counts, or a total fine of $2500.00, and that the individual defendants each pay a fine of $50.00 on each of said Counts, or a total fine for each defendant of $250.00.

Each of the defendants have at all times been and are now released on their own recognizance.

The Above-Named Appellants, and Each of Them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 5th day of December, 1951.

WOODARD LABORATORIES, INC.,

By /s/ DEAN D. MURPHY,
President.

/s/ DEAN D. MURPHY.

/s/ JOHN L. SULLIVAN.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 5, 1951. [32]

In the United States District Court, Southern District of California, Central Division

No. 21770—Criminal

Honorable Wm. M. Byrne, Judge Presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOODARD LABORATORIES, INC., a Corporation, and DEAN D. MURPHY and JOHN L. SULLIVAN, Individuals,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

ERNEST A. TOLIN,
United States Attorney;

RAY H. KINNISON,
Assistant United States Attorney,
Chief, Criminal Division, by

TOBIAS G. KLINGER,
Assistant United States Attorney.

For the Defendants:

EUGENE M. ELSON, ESQ. [1*]

*Page numbering appearing at top of page of original Certified Reporter's Transcript.

November 7, 1951—9:45 A.M.

The Clerk: No. 21770 Criminal, United States of America v. Woodard Laboratories, Inc., and Dean D. Murphy and John L. Sullivan, for non-jury trial.

Mr. Elson: The defendants are ready.

Mr. Klinger: The Government is ready, your Honor.

The Court: A waiver of jury trial has been filed in this case, has it not?

Mr. Klinger: Yes.

The Court: You may proceed. [3]

* * *

(Plaintiff's Exhibit No. 1 was then offered and received in evidence without objection.)

Mr. Klinger: I will call Mr. Carol, your Honor, to the stand.

JONAS CAROL

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Klinger:

Q. Mr. Carol, will you tell us your residence and your occupation?

A. I live in Silver Spring, Maryland, and I am a chemist for the United States Food and Drug Administration.

(Testimony of Jonas Carol.)

Q. And for how long have you been engaged in that work? A. 21 years. [7]

Q. And what is your present position with the Food and Drug Administration?

A. I am Chief of the Synthetic Branch of the Division of Pharmaceutical Chemistry.

Q. Now, will you tell us, Mr. Carol, something of your educational background in chemistry and drug chemistry?

A. I have a bachelor's degree and a master's degree in chemistry from Washington University in St. Louis, Missouri, in the years 1929 and 1930, respectively.

After receiving my master's degree, I was appointed to a position with the Food and Drug Administration and have been there ever since.

My work has been practically all in either the analyses of drugs or developments of methods for the analysis of drugs, and during the last six years I have been engaged exclusively in the development of methods of analysis of estrogenic hormones, with some small amount of work in other hormones.

While engaged in that work, I have written about, oh, 22 papers that have been published in scientific journals on drug chemistry and the chemistry of hormones.

Also, I frequently instruct various chemists from commercial firms and educational institutions on the methods of analysis of hormones.

I frequently sit in on the granting of doctors' degrees at Georgetown University in Washington.

(Testimony of Jonas Carol.)

That work is all on [8] either hormone chemistry or spectrometric analysis.

Q. Does that mean you pass on candidates applying for the degree of Doctor of Philosophy at Georgetown University?

A. That's right. I am what is called a reader of theses.

Q. Of theses? A. Yes.

Q. Submitted by the students? A. Yes.

Q. Have you told us about your teaching experience?

A. Yes. I explained that I have many students or people, you might say chemists, from different pharmaceutical, commercial pharmaceutical houses, some of the law-enforcement agencies, both in this country and foreign countries, and educational institutions, that come and study in the Food and Drug Administration on methods of analysis and in hormone chemistry.

Q. Mr. Carol, could you estimate at all how many drugs you have analyzed in the time you have been associated with the Food and Drug Administration?

A. Many thousands, would be about all that I could say offhand.

Q. Then let's confine ourselves to drugs containing alpha-estradiol, the substance involved in this case. How many determinations of drugs containing alpha-estradiol would [9] you estimate you have made in the years you have been with the Food and Drug Administration?

(Testimony of Jonas Carol.)

A. Approximately a thousand.

Q. What would you say alpha-estradiol is?

A. It is one of the estrogenic hormones or what are called female sex hormones.

Q. Is that both in natural form and synthetic, as well? Can it be made synthetically?

A. It can be made synthetically, though heretofore it has been produced from natural sources.

Q. What is the U.S.P.? It is referred to as the U.S.P. Will you tell us what those initials stand for?

A. It is the United States Pharmacopoeia, a publication of the United States Pharmacopoeia Convention which meets periodically, and which at all times has various committees and groups that devise standards for drugs, write monographs describing the drugs and tests that are made to establish their purity and composition, and these are legal as the Pharmacopoeia is mentioned in the Food and Drug Act as a legal specification for the drugs involved.

Q. And does it also contain procedures for analysis of drugs? A. Yes.

Q. And does the U. S. Pharmacopoeia contain an official U. S. P. method of analysis for alpha-estradiol? [10]

A. For alpha-estradiol and alpha-estradiol in tablets.

Q. Can you tell us, Mr. Carol, what part you and your associates of the Food and Drug Administration played in the development and the writ-

(Testimony of Jonas Carol.)

ing of the United States Pharmacopoeia method of analysis of alpha-estradiol in tablets?

A. Well, my associates and I did the experimental work and actually wrote the method that has been published under "Alpha-Estradiol in Tablets" in the U. S. P.

Q. And how did you come to write the monograph on the method?

A. We were asked to by the United States Pharmacopoeia.

Q. Now, for a shorthand expression, how is that method referred to, is it referred to in any particular way, as "U. S. P." meaning something, is that the way it is generally referred to, or "U. S. P., page 14," or something of that kind?

A. Well, this is the fourteenth revision of the U. S. P., and I don't remember which page it is on.

Q. So that, for the purposes of this trial, if a reference is made to U. S. P. XIV, is that the way it is generally referred to? A. That is right.

Q. That particular method of analysis?

A. That is the latest revision of the U. S. P.

Q. Now, is that the only method of analysis of this type of drug? [11]

A. No. There are many ways of analyzing this type of drug.

Q. And will you tell us at least something about a few of them? What other methods are there, what are they called?

A. All methods would start out approximately the same. That would involve some way of extract-

(Testimony of Jonas Carol.)

ing the alpha-estradiol from the tablet material. Then, after suitable steps, you could determine the alpha-estradiol by a number of colorimetric procedures, that is where by one reaction you develop a color and measure that intensity of color against a standard.

Q. So that all methods involve, first, extraction of the alpha-estradiol?

A. That is right, from the tablet material.

Q. From the remainder of the tablet?

A. That is right.

Q. And with some way of measuring it?

A. Measuring it.

Q. The alpha-estradiol that you have extracted from the tablet, is that right?

A. That is right.

Q. And U. S. P. XIV is one of those methods?

A. Yes.

Q. What other methods are there, or how are they referred to? [12]

A. Well, there is a method by which you could determine the alpha-estradiol directly by an ultraviolet spectro-photometer, or you could do it by infrared spectro-photometry, or you could do it by a fluorometric method.

Q. Are those the most common ones, I mean general methods?

A. Those are all common procedures.

Q. And those procedures, with respect to the extraction in each case, the extraction process, that is, is there anything new or novel about the extraction

(Testimony of Jonas Carol.)

of alpha-estradiol as distinguished from the extraction of many other drugs that you might seek to extract from a tablet?

A. This general process of extraction has been used for many years, at least 50 years.

Q. And with respect to the measurements, the various methods of measuring the extracted alpha-estradiol, what would you say with respect to that?

A. The earliest method I can think of was published in about 1933 or 1934, that could be used, and right after that there were a number of procedures that could be used.

Q. So that the method that you referred to as U. S. P. XIV in shorthand, is that a combination and a refinement on the extraction and measurement of processes heretofore used or theretofore used?

A. It is an adaptation of methods that have been [13] published, adaptation and refinement.

Q. And the U. S. P. XIV method, is that a relatively difficult or relatively easy method of analysis compared to these others?

A. It is relatively simple compared to many of the hormone analyses. Some of the more difficult ones would require separation of as many as eight to ten closely related substances, that would be very lengthy. Here, you are dealing with a single, pure chemical compound.

Q. Now, then, Mr. Carol, with that background, I will ask you, first, did you receive, in the course of your official business, samples of Woodard Lab-

(Testimony of Jonas Carol.)

oratories Estrocrine identified by "FDA Sample number 29-274 K" and "Woodard Lot No. 497567," which are involved in counts I and II of the complaint or the information on file in this court?

A. I did.

Q. And will you tell us what you did with that material?

A. I made analysis of these tablets, using an infra-red procedure, and found that they contained 0.015 milligrams of alpha-estradiol per average tablet.

Q. When did you make that analysis?

A. It was reported 1-20-50.

Q. That is January 20th?

A. January 20, 1950. [14]

Q. And that finding of 0.015 is what percentage of the declared potency of 0.022?

A. 68 per cent.

Q. And you testified that you used the infra-red method of analysis? A. Yes.

Q. And how did you come to choose that method of analysis?

A. That method is the most informative and most definite method that we have available, if I may explain——

Q. Yes.

A. By an infrared analysis, you obtain not only the quantitative amount of the ingredient, but you obtain what is called a fingerprint of the material, so that you can look at the tracing that you get in the infrared spectro-photometer and you can say,

(Testimony of Jonas Carol.)

"I have alpha-estradiol in this case and nothing else," and also the exact amount of alpha-estradiol.

Q. That is, in the one process?

A. In the one process.

Q. Did you subsequently analyze that sample again?

A. Yes. On August 6th of this year, I re-analyzed a portion of the sample and found, as before, 0.015 milligrams of alpha-estradiol per average tablet, or 68 per cent.

Q. Then, what was the amount?

A. The same as before, 0.015 milligrams per average [15] tablet.

Q. And that was done approximately a year and a half after the first analysis? A. Yes.

Q. And for the purpose of determining what?

A. I wanted to determine whether there had been any deterioration of the drug in the year and a half that had elapsed from the first analysis.

Q. And you finally established what, with respect to that? A. That it was unchanged.

Mr. Elson: That it was what?

The Witness: Unchanged.

Q. (By Mr. Klinger): With reference to this sample that you have testified about, Mr. Carol, and the other samples that you are going to testify about, what special test or what special procedure did you follow to verify the accuracy of your findings?

A. In the initial step, the initial step of the anal-

(Testimony of Jonas Carol.)

ysis involves an extraction procedure. In these cases, I carried out that extraction procedure using six portions of ether to extract the drug, and then combining those six portions of ether and carrying on the analytical procedure to the end.

After doing that, on the same residue, on the unextracted [16] residue, I extracted six times more, as before, combined those extractions and re-analyzed that portion, in each case I found no alpha-estradiol in the second combined extractions.

Q. I think it might be worth while, Mr. Carol, to explain a little about the extraction, just in as simple terms as possible, as you have explained it to me before, something about the extraction by the use of ether and chloroform, those circumstances with respect to alpha-estradiol.

A. First, the tablets, after being weighed, are powdered, and an amount of the powder to contain the amount of active ingredient you wish to finally test is weighed and suspended in water and placed in what is called a separatory funnel, a glass, pear-shaped device that has a stopcock at the bottom and a stopper at the top.

Then, you add what is known as an emissible solvent. It can be either heavier or lighter than water. In this case I used ether, which is lighter.

You pour that in on top of the water in suspension of the tablet material, and then shake it. When you shake it, the active ingredient, which is more soluble in ether than it is water, will pass into the ether.

(Testimony of Jonas Carol.)

Then, by the use of the stopcock, you can draw off the water, and the alpha-estradiol remains in the ether.

Now, of course, you do not get it all on the [17] first extraction, so you draw that water off into a second separatory funnel.

Q. What do you get on the first extraction, about what percentage do you get?

A. In this case I would say better than 90 per cent on the first time.

Q. Then you go back to the part that is left?

A. Yes.

Q. And re-extract from that?

A. And then re-extract another portion of the ether. Then, you continue to do that until you have no more water left in the active ingredient.

Then you combine all the ether in that case and go through all the other steps of analysis.

Q. Then, when you are testifying about the double check you made, you then went back and again extracted six times from what is left?

A. That is right.

Q. And found that there was no more alpha-estradiol left, is that true? A. That is true.

Q. And that was done concerning each of the samples concerning which you are going to tell us here, is that right? A. That is right.

Q. Did you make a similar analysis of a package of [18] Estrocrine which you received under "Sample No. 49-677 K, Woodard Lot No. 897618,"

(Testimony of Jonas Carol.)

involved in counts III and IV of the information here?

A. Yes. I analyzed that, as before, using the procedure used before, and found 0.014 milligrams of alpha-estradiol per tablet, equivalent to 63 per cent of the declared.

Q. 63 per cent of the declared?

A. Of the declared, yes.

Q. By "declared" you mean the declared potency?

A. Potency, yes, and I reported that on April 14, 1950.

Q. And did you make a similar analysis of a package of Estrocrine under "Sample number 49-693 K, Woodard Laboratories Lot No. 107694," involved in counts V and VI of the information?

A. Yes.

Q. And what did you find there?

A. In that case, using the same procedure, I found 0.006 milligrams of alpha-estradiol per average tablet, or 28 per cent of the declared amount present. I reported that on May 31, 1950.

Then, I re-analyzed that sample in August, on August 6, 1951, and this time found 0.005 milligrams of alpha-estradiol per average tablet, or 23 per cent of the declared amount.

Mr. Elson: Pardon me. Just a minute. You are talking [19] about your sample 49-677 K?

Mr. Klinger: No. We are now speaking about our sample 49-693 K. He testified about 49-677 K.

(Testimony of Jonas Carol.)

Mr. Elson: Can I have what he found in August, on number 49-677 K?

Mr. Klinger: He did not do any in August on that sample.

Mr. Elson: This last one, then, was what?

Mr. Klinger: 8-6-51 would be on the 49-693 K. I believe the witness testified he found 0.005 or 23 per cent of the declared potency.

Q. Mr. Carol, turning to the next sample, did you make a similar analysis of a package of Estrocrine under "Sample number 53-254 K, Woodard Laboratories Lot No. 497567," being a portion of the material involved in counts VII and VIII of the information in this case? A. Yes.

Q. Using the same method?

A. Using the same method as before, and I found 0.015 milligrams of alpha-estradiol per average tablet, or 68 per cent of the declared, and I reported January 20, 1950.

Q. And with respect to the material involved in counts IX and X of the information on file in this case, did you make a similar analysis of a package of Estrocrine under "Sample number 88-164 K, Woodard Laboratories Lot No. 107694"?

A. Yes. Using the same procedure, I found 0.006 [20] milligrams of alpha-estradiol per average tablet, equivalent to 28 per cent of the declared, and I reported that June 13, 1950.

Q. Did you also have analyses conducted under your supervision and control at the Food and Drug

(Testimony of Jonas Carol.)

Administration by one of your associates, Dr. Haenni? A. Yes.

Q. Is that right?

A. Dr. Edward Haenni.

Q. Now, these analyses conducted by Dr. Haenni were made on samples that you gave to Dr. Haenni?

A. I personally gave Dr. Haenni three of these samples, all our number 49-677 K, involved in counts III and IV. And he analyzed those by the U. S. P. method, which he had a large part in writing.

* * *

Q. (By Mr. Klinger): He was one of the associates that worked in the development of that U. S. P. method, is that right? A. Yes.

Q. As you have testified to before?

A. That is right.

Q. You gave him an ocular portion of sample number [21] 49-677 K? A. Yes.

Q. Involved in counts III and IV?

A. By the U. S. P. method.

Q. By the U. S. P. method?

A. Yes, and he found 0.014 milligrams of estradiol per average tablet, or 63 per cent of the declared.

Q. That was done on what date?

A. That was reported May 14, 1950.

Q. May or April? A. April.

Q. April? A. I have the dates here.

Q. And that was from Woodard Lot No. 897618, is that correct? A. That is right.

(Testimony of Jonas Carol.)

Q. That report was signed by yourself, as well, since it was conducted under your supervision, is that right?

A. That is true. Dr. Haenni turned his results over to me on the samples, and I signed his report.

Q. And that is one sample you gave him?

A. Yes.

Q. Did you also give him another sample?

A. In a similar fashion, I gave him our sample number 49-693 K (counts V and VI), Woodard Lot No. 107694. He [22] analyzed it by the U. S. P. method and found 0.007 milligrams of alpha-estradiol per average tablet, or 32 per cent of the declared, and he reported that May 31, 1950.

And in a similar fashion, I gave Dr. Haenni our sample number 88-164 K, involved in counts IX and X, Woodard Lot No. 107694. He analyzed it as before by the U. S. P. method and he found 0.007 milligrams of alpha-estradiol per average tablet, or 32 per cent of the declared.

The Court: Which one was that?

The Witness: That was our sample number 88-164 K.

Q. (By Mr. Klinger): Involved in counts IX and X of the information, is that right?

A. That is right.

Q. And he reported that on what date?

A. He reported that the 13th of June, 1950.

Now, in all cases, Dr. Haenni followed the U.S.P. exactly. In addition, on the initial extraction procedure, using chloroform as specified in the U. S. P.,

(Testimony of Jonas Carol.)

he made four additional chloroform extractions and carried those through the U. S. P. procedure, and found no alpha-estradiol in those.

Q. That was the form of double check on the analyses? A. That is right.

Q. And that was made by Dr. Haenni?

A. That was made by Dr. Haenni.

Q. Again under your direct supervision and control, is [23] that right?

A. That is correct.

Q. You are the chief of the branch?

A. Of the branch.

Q. In which he was employed, is that right?

A. That is right.

Mr. Klinger: Your Honor, I think I am through with this witness, but may I just take a moment to make certain?

Q. I will just ask, as a concluding question, Mr. Carol, you also turned the samples over for analysis to Dr. Banes of your staff, is that right?

A. That is right.

Q. Dr. Banes is here to testify?

A. That is right.

Mr. Klinger: I just wanted to establish that fact. No further questions from this witness.

Do you wish to cross-examine him, counsel?

Mr. Elson: Just a second. No.

(Witness excused.)

Mr. Klinger: I will call Dr. Banes, your Honor.

DANIEL BANES

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows: [24]

* * *

Direct Examination

By Mr. Klinger:

Q. Dr. Banes, will you tell us your residence and your occupation, please?

A. I reside in Silver Spring, Maryland. I am a chemist with the United States Food and Drug Administration, in Washington, D. C.

Q. And for how long have you been a chemist with the Food and Drug Administration?

A. I have been employed by the Food and Drug Administration since 1939.

Q. And what did you specialize in, at the Food and Drug Administration?

A. I have specialized in drug analysis since 1940, and my chief work has been in research on the analysis of estrogenic hormone preparations since 1948.

* * *

Q. (By Mr. Klinger): By the way, you are in the branch or division which is headed by Mr. Carol?

A. That is right, in the Division of Pharmacological Chemistry, in the Synthetic Branch.

Q. And I do not think I developed it with Dr. Carol, but I will ask you: In the research in this field, have there been any new substances developed and found by your group? [25]

(Testimony of Daniel Banes.)

A. This part of the work in research has been devoted mainly to the development of analytical methods for estrogenic hormones, which group was headed by Mr. Carol in isolating three new female sex hormones relating to alpha-estradiol.

Q. Will you tell us something about your educational background?

A. I took a Bachelor of Science degree in chemistry at the University of Chicago in 1938, and a Master of Science degree at the University of Chicago in 1940. I took my Doctor of Philosophy degree at Georgetown University in Washington in 1950.

Q. What was your thesis in connection with your Ph.D. degree?

A. The thesis was on the natural estrogenic ketosteroids. Ketosteroids, I might say, is a specific type of estrogenic hormone.

Q. What professional societies and groups are you a member of?

A. I am a member of the Association of Official Agricultural Chemists. I was elected to the Phi Beta Kappa from the University of Chicago, and I am a member of the Gold Key Society, which is an honorary society of Georgetown University.

Q. What other professional work and experience have you done and had? [26]

A. I have written 12 papers dealing with the analysis of drugs, and the last part of those have been on the problem of estrogenic hormones. Those publications are in well-known scientific journals.

(Testimony of Daniel Banes.)

I have been a referee on estrogenic synthetic hormones for the Association of Official Agricultural Chemists for the last two years.

I have delivered papers before the American Chemical Society, dealing with estrogenic hormones.

Q. Now, to short-cut testimony a bit, I will ask you, you heard Mr. Carol testify regarding the various methods of analysis and the period of time that the various methods have been in existence, the extraction processes, the measurement processes, and so on? A. Yes.

Q. Would your testimony in each of those instances be substantially the same if I put the same questions to you? A. I believe it would.

Q. Now, in the course of your official business as chemist at the Food and Drug Administration, did you receive samples of Woodard Laboratories Estrocrine, identified by "Sample number 29-794 K," of Woodard Lot No. 497567, which are involved in counts I and II of the information here on file? A. I did.

Q. And did you make an analysis for the alpha-estradiol [27] content of that sample?

A. I did. I analyzed the sample according to the method in U. S. P. XIV.

Q. Did you follow the U. S. P. method exactly, with respect to the extraction?

A. On this sample I followed the U. S. P. method exactly with regard to the extraction.

Q. Before testifying with respect to your analysis or assay of this sample, I will ask you, with

(Testimony of Daniel Banes.)

respect to this sample and with respect to all of it concerning which you are to testify, what check or further test did you make after each analysis, to verify the result which you obtained?

A. In developing the U. S. P. method, our group tested a large number of samples containing various amounts of alpha-estradiol and convinced ourselves that the number of extractions called for and the amounts used for analysis would give a complete extraction of the alpha-estradiol and would permit an accurate assay for the alpha-estradiol.

Now, the method as written calls for a quantity of sample which will contain 0.200 milligrams of alpha-estradiol in water to be extracted, and that is to be extracted four times from chloroform. The reason that chloroform is used instead of ether is that chloroform, being heavier than water, can be drawn off through the bottom of the funnel instead of having the water drawn off through the bottom, and [28] re-extracted. You can, therefore, use the same funnel, using the water and chloroform and shaking off the chloroform, draw off the chloroform. We were quite certain that with four extractions with chloroform it would extract all of the alpha-estradiol.

It has been previously stated that in a mixture of chloroform or any other similar solvent, for instance, ether, at least 90 per cent of the alpha-estradiol will go into the organic layer, so called, with the chloroform or the ether, meaning that 10 per

(Testimony of Daniel Banes.)

cent, approximately, would be retained in the water, on the first extraction.

Now, of that 10 per cent remaining in the water, the second extraction would take 90 per cent of that. In other words, 9 per cent, on that basis, would be in the chloroform on the second extraction, leaving 1 per cent behind. Of that 1 per cent, nine-tenths would then go into the chloroform on the third extraction, leaving just one-tenth of one per cent, and practically all of that would be taken out on the fourth extraction.

As I say, we went through that many, many times, to make sure that was the case.

Q. That was before the method was written?

A. That was before the method was written, in order that it might be accepted by the Pharmacopoeia. We made certain that it would extract that quantity of alpha-estradiol, [29] no matter what the mixture was.

Q. If properly done, I take it.

A. If carefully done, it should. However, just to make certain that there wasn't something in these particular samples that might retain some of the alpha-estradiol, after all four of those extractions were made, I re-extracted all of these samples with four further portions of chloroform, evaporated the chloroform, went through the whole method prescribed by the Pharmacopoeia, and tested the second group of extractions, and in all cases found a very negligible quantity of alpha-estradiol, not sufficient to affect the results found.

(Testimony of Daniel Banes.)

Now, it would be impossible on physical grounds——

Q. Let me say, that "negligible" is your opinion.

A. I can give you a figure on that.

Q. Give us a figure on what you mean by "negligible."

A. I found less than 0.0002 milligrams of alpha-estradiol per tablet.

Q. That is less than two ten-thousandths?

A. Of a milligram of alpha-estradiol per tablet. That was the greatest possible amount there on the basis of the color development.

Mr. Elson: That is 0.0002?

The Witness: Milligrams of alpha-estradiol per tablet found in the second group of [30] extractions.

It would be impossible on physical grounds, if that small a quantity were taken out on the second group, for anything even like that quantity to remain in the third group. In other words, there was no alpha-estradiol left behind after the fourth group of extractions as prescribed by the Pharmacopoeia.

Q. (By Mr. Klinger): And that double check was made by you with respect to each of the samples that you analyzed, is that correct?

A. That is correct.

Q. All right. Now, you made certain double checks with respect to certain of the samples, but we will come to those when we take up the particu-

(Testimony of Daniel Banes.)

lar samples. But the further test that you have described now was made with regard to each of the samples, is that correct? A. That is correct.

Q. All right. Now, turning to the sample involved in counts I and II, sample number 29-794 K, Woodard Lot No. 497567, what were your findings made according to the U. S. P. colorimetric method?

A. I found in each table 0.016 milligrams of alpha-estradiol.

Q. And what percentage of the declared quantity would that represent?

A. That was 73 per cent of the declared quantity. [31]

Q. With respect to the shipment involved in counts III and IV of the information, "FDA Sample number 49-677 K, Woodard Lot No. 897618," will you tell us what your findings were with respect to your analysis there?

A. The finding was 0.016 milligrams of alpha-estradiol per average tablet. I should point out that I am rounding that out in figures. In each case the finding was slightly less than that. It is 0.016 milligrams of alpha-estradiol per tablet.

Q. And that represented what percentage of the declared quantity?

A. That represents 73 per cent of the declared quantity.

Q. In each case, what date did you report your analysis? I think it was all on the same date.

A. Those analyses were all reported on the 6th of August, 1951.

(Testimony of Daniel Banes.)

Q. Now, with respect to the material involved in counts V and VI of the information, namely, sample number 49-693 K from Woodard Lot No. 107694, what were your findings with respect to that sample?

A. I found on that examination 0.0068 milligrams of alpha-estradiol per average tablet, representing 31 per cent of the declared quantity of alpha-estradiol.

Q. Now, with respect to this sample, you made, I believe, or did you, a further test? Is that [32] right? A. That is correct.

Q. And will you tell us what that double check or test was and what the results were?

A. Since this sample was so much lower than the others, I wanted to make absolutely certain that there wasn't a question of an error in the extraction.

Mr. Elson: Now, just a minute. I think that is going a little bit beyond even what an expert can testify to. That is what the judge is to determine here, as to whether or not with certainty a certain result follows. Now, when he states that he wanted to make sure, with absolute certainty, a certain thing, I think that is exceeding his prerogative and I object to that on that ground.

The Court: You just go ahead and testify to what you did, Doctor.

The Witness: Yes, sir.

I crushed 30 tablets and put them into a thimble, a part of a Soxhlet extraction apparatus. Now,

(Testimony of Daniel Banes.)

this apparatus will permit the continuous extraction of solid material, and in this case I chose a methyl alcohol as my solvent. The apparatus is set up so that it will operate similarly to a coffee percolator, to give a continuing extraction. There is a still in which the methyl alcohol is kept continuously boiling, and the vapors of the methyl alcohol are condensed so that they will drop onto the material extracted, and with [33] the continuous extraction the material passes out of the thimble and back into the still.

The thimble is constructed so that the solution of whatever is soluble will go out with the methyl alcohol, and the residue, which is not soluble enough to go out, will remain in the thimble.

I made that continuous extraction for seven hours and then tested the undissolved material to see if any alpha-estradiol remained in the undissolved portion.

Applying the U. S. P. XIV method, I found no alpha-estradiol remaining in the undissolved portion.

I then took the portion in the methyl alcohol, whatever was soluble in the methyl alcohol, and I evaporated that, and, after evaporation, went through the U. S. P. XIV method on the methyl alcohol-soluble portion. Alpha-estradiol is very soluble in methyl alcohol.

That soluble portion gave results equivalent to 0.007 milligrams of alpha-estradiol per tablet,

(Testimony of Daniel Banes.)

which checked the results obtained by following the U. S. P. XIV method from the start.

Q. (By Mr. Klinger): Now, turning to counts VII and VIII, respecting this verification test that you have described, did you also, in the course of that, make any tests to establish that any of the alpha-estradiol was not destroyed in the heating process of the solvent? [34]

A. Yes. I subjected a standard quantity of alpha-estradiol, 0.02 milligrams of alpha-estradiol, to a similar continuous extraction, to see if any of it would be destroyed in this process, and recovered 98 per cent of the put-in quantity, indicating that alpha-estradiol was not destroyed in continuous extraction.

Q. Turning to counts VII and VIII now, that is, the shipments of material involved in counts VII and VIII of the information, sample number 53-254 K, Woodard Lot No. 497567, did you analyze that sample, and by what method, if you did, and what were your findings?

A. We analyzed that sample by the method in U. S. P. XIV and found 0.016 milligrams of alpha-estradiol per tablet, or 73 per cent of the declared quantity.

Q. And with respect to the shipments of material involved in counts IX and X of the information, "FDA Sample number 88-164 K, Woodard Lot No. 107694," did you make a similar analysis there, and what were your findings?

A. I found in those tablets 0.0066 milligrams of

(Testimony of Daniel Banes.)

alpha-estradiol per tablet, or 30 per cent of the declared quantity. Those results were reported on the 6th of August, 1941.

Q. And with respect to that analysis, the analysis of that sample, what if any tests did you make to verify the results which you obtained? [35]

A. After making the extractions called for in the United States Pharmacopoeia and the four additional extractions to verify the complete extraction of alpha-estradiol, I then added to the mixture of water and what was left of the tablets, I added to that exactly 0.200 milligrams of alpha-estradiol, to see if that could be recovered quantitatively by following the U. S. P. procedure. I applied the U. S. P. procedure and recovered 97 per cent of the put-in quantity of alpha-estradiol.

Q. So that, if I may understand you correctly, you sought to verify the result of the first analysis by extracting a known quantity that was placed into the solution, is that right?

A. I extracted a known quantity from the mixture of water and whatever excipients there were, what other tablet constituents there were, for alpha-estradiol, after extraction, to make sure that alpha-estradiol could be extracted from such a mixture quantitatively.

Q. In addition to these analyses and these verification tests and experiments that you describe, did you also further test your results by simulating the tablet involved in this case and seeking to extract alpha-estradiol from it?

(Testimony of Daniel Banes.)

A. As I said, in the development of the method and also after these samples were analyzed, our group made up mixtures to simulate tablets containing the declared amount [36] of alpha-estradiol and also containing alpha-estradiol as low as the results that we reported, and were able, in all cases, to recover that amount of alpha-estradiol from such mixtures.

Mr. Klinger: No further questions, your Honor, from this witness.

The Court: We will take a five-minute recess.

(Recess.)

The Court: You may proceed.

Cross-Examination

By Mr. Elson:

Q. Dr. Banes, right at the last of your testimony you stated that you simulated a tablet such as the one that you would assay?

A. Yes, sir. That is correct.

Q. Will you tell me what you did in that simulation?

A. We weighed out quantities of corn starch and sucrose.

Q. And what?

A. Sucrose (sugar), and added to that a small amount of magnesium stearate and mineral oil, those being excipients that are commonly used in preparing tablets of this sort, and added a portion of this mixture which would correspond to an aver-

(Testimony of Daniel Banes.)

age weight tablet in these samples, added to those known amounts of alpha-estradiol, and then put each portion of the mixture through an analysis as called for by the U. S. Pharmacopoeia. [37]

Q. Did you make this up in a tablet form?

A. No. We powdered the material together.

Q. You powdered the material together. Now, I was listening to get, and I would like to get in my notes, what the excipients were that you put into your mixture. The first was corn starch?

A. Corn starch.

Q. Then, sugar? A. Sugar.

Q. Then what? A. Mineral oil.

Q. Yes. A. And magnesium stearate.

Q. And what else? I am leaving out the alpha-estradiol. A. That was the total mixture.

Q. Now, can you tell me the quantity of corn starch that you put in? Strike that.

That mixture that you made up, are you able to say how many tablets in finished form, finished tablets, that mixture would comprise?

A. Ten tablets.

Q. Ten? A. Ten.

Q. Now, can you give me, in grams, the amount of corn starch that you put in? [38]

A. I don't have that in this notebook. I can. It is available here, though.

Q. I would like to have it.

A. The average weight per tablet was approximately 0.3 grams. It was somewhat larger than that—0.33 or 0.32 grams.

(Testimony of Daniel Banes.)

Q. 0.32 grams of corn starch?

A. No. That was average weight per tablet we had determined in analyzing these samples. We therefore took a weight of excipient mixture of 3.2 grams for the analysis, of which 50 per cent was corn starch—in other words, 1.6 grams of corn starch in each.

The mixture was made to contain 45 per cent powdered sugar, and that would be 45 per cent of 3.2 grams, or approximately 1.5 grams of sugar.

Q. All right.

A. The excipient mixture was made to contain 3 per cent magnesium stearate and 2 per cent mineral oil.

Q. The magnesium stearate would be how much in grams? A. About 0.09 grams.

Q. About 0.09 grams? And the same with the mineral oil?

A. The mineral oil would be 0.06 grams.

Q. These figures, taking corn starch, 1.6 grams of corn starch, is that the amount of corn starch per tablet? [39]

A. No. That is the amount of corn starch in the total sample taken, which will represent ten tablets.

Q. So one-tenth of the figures you have last given me would be a fair representation of the amounts of these excipients in each simulated tablet?

A. In each simulated tablet, that is correct.

Q. Why did you make ten tablets, or a mixture equaling approximately ten tablets?

(Testimony of Daniel Banes.)

A. The quantity called for in the United States Pharmacopoeia for analysis would be powdered material containing 0.2 milligrams of alpha-estradiol. The tablets were declared as having 0.022 milligrams of alpha-estradiol per tablet. For the U. S. P. analysis, then, we would require nine to ten tablets, if these tablets had the declared amount of alpha-estradiol, in order for them to have 0.2 milligrams of alpha-estradiol, and therefore you would require a quantity of powdered material equivalent either to nine or ten tablets weighed out accurately.

We, therefore, took 3.2 grams of powdered material as simulating the amount ofpowdered excipients that we would have if we had analyzed ten tablets of these samples.

Q. In other words, the declared potency or labeled potency of that particular product had ten times less the number of milligrams or micrograms than the tablet which is mentioned there in the U. S. P. method? [40] A. No.

Q. For assay?

A. No. The U. S. P. assay is applicable to any tablet of alpha-estradiol, but the U.S.P. method requires for the assay an alpha-estradiol portion of the tablets which will contain 0.2 milligrams.

Q. That would be 200 micrograms?

A. That would be 200 micrograms, a microgram being a thousandth of a milligram. That is right, 200 micrograms.

Now, if a tablet is declared as 0.02 milligrams,

(Testimony of Daniel Banes.)

then you would require a powdered mixture equivalent to ten tablets in your assay.

Q. That is right.

A. If, as in this case, they were labeled to contain 0.022, you would require nine, approximately.

Q. In other words, ten times more tablets?

A. That is right. If a tablet were contended to contain 0.2 milligrams, it would require a quantity equivalent to one tablet, but the U. S. P. method merely requires that in the assay it contain a portion of the sample which will contain that much alpha-estradiol.

If we were to assay a tablet which is labeled to contain 0.005, then, we would use, for our assay, powdered material equivalent to 40 tablets, since 40 tablets would then give the required 0.2 milligrams of alpha-estradiol. [41]

Mr. Elson: I have no further questions.

Mr. Klinger: No redirect, your Honor.

The Court: You may step down.

The Witness: Thank you, your Honor.

Mr. Klinger: The Government rests, your Honor.

(Thereupon the Plaintiff rested its case in chief.)

(And thereupon the defendants, to maintain the issues on their behalf, offered and introduced the following evidence, to wit:)

JOHN L. SULLIVAN

a defendant herein, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

* * *

Direct Examination

By Mr. Elson:

Q. Are you connected with the Woodard Laboratories? A. Yes.

Q. In what capacity? A. General manager.

Q. And how long have you held that position?

A. Since 1946. [42]

Q. Now, in connection with the products that are the subject of this litigation here, did Woodard Laboratories order the estradiol which was used in the manufacture of them? A. Yes.

Q. And who did Woodard order it from?

A. Silas & Co. It is a broker.

Q. I can't hear you. A. Silas & Co.

Q. Well, did Silas & Co. furnish it?

A. He furnished it through the International Hormones company. He is the broker for them.

Q. And where are they?

A. In Brooklyn, New York.

Q. Now, coming to counts I and II, which pertain to Woodard Lot No. 497567—and, incidentally, what does the lot number mean on a package?

A. Well, it is our control number of when the merchandise was received and when we packaged it, so we have complete control of each item.

Q. So that every piece of merchandise that is

(Testimony of John L. Sullivan.)

in that particular manufactured batch put into a package bears the same lot number? A. Yes.

Q. And the same would be true with a different lot number, with some other batch? [43]

A. That is right.

Q. With respect to counts I and II, Lot No. 497567, that was ordered through Silas & Co.?

A. Yes.

Q. And when did you order that?

A. April 18, 1949.

Q. And how much did you order?

A. 4.5 grams.

Q. And was that to be shipped to Woodard Laboratories or to someone else?

A. It was to be shipped to Crest Laboratories.

Q. And where are they located?

A. Burbank, California.

Q. And was that to be used by Crest Laboratories in the manufacture of the tablets that bear Lot No. 497567? A. Yes.

Q. And had you ordered, at or about the same time, that is, April 18, 1949, from Crest Laboratories, the manufacture of a certain quantity of tablets? A. Yes.

Q. Now, with regard to the 22-microgram tablets that are the subject of those two counts and that lot number, how many of those tablets did you order Crest Laboratories to manufacture for you?

A. 150,000. [44]

Q. Now, at the same time, did you also order the manufacture of some other tablets, that is,

(Testimony of John L. Sullivan.)

estradiol tablets, alpha-estradiol tablets containing a different potency than 22 micrograms?

A. Yes.

Q. And what were those that you ordered?

A. We ordered 10,000, each tablet containing 0.11 milligrams of alpha-estradiol.

Q. Or 110 micrograms?

A. Or 110 micrograms.

Q. Were the 22-microgram tablets and the 110-microgram tablets all to be manufactured from this 4.5 grams of alpha-estradiol that you said that you ordered? A. Yes.

Q. Now, then, subsequently did you receive any of these tablets from the Crest Laboratories?

A. On April 29th we received 143,500 of the Estrocrine tablets, of the 22-microgram potency.

Q. From Crest Laboratories?

A. From Crest Laboratories.

Q. There is no need of going into the details of the 110-microgram tablets, because they are not the subject of this lawsuit. You also received a quantity of those from Crest Laboratories?

A. Yes. [45]

Q. Now, coming to the products which are the subject, of counts III and IV, which are Woodward Lot No. 897618, did you order the estradiol to be used in the manufacture of these products?

A. Yes.

Q. And from whom and when?

A. From Silas & Co., on August 15, 1949.

Q. And how much did you order?

(Testimony of John L. Sullivan.)

A. 4.5 grams.

Q. Was that to be shipped to you or to the Crest Laboratories?

A. To be shipped to Crest Laboratories.

Q. And had you ordered of Crest Laboratories the manufacture of a certain quantity of these tablets? A. Yes.

Q. When was that?

A. On August 15, 1949, we ordered Crest to manufacture 100,000 of the 22-microgram tablets.

Q. Did you also order the manufacture of some 110-microgram tablets out of the same estradiol?

A. Yes, on the same date.

Q. Did you subsequently receive the 22 and the 110-microgram tablets from Crest Laboratories?

A. Yes.

Q. When? [46]

A. On August 22, 1949, we received 99,000 of the 22-microgram tablets.

Q. And you also received a quantity of the 110 which are not involved here?

A. That is right.

Q. Now, coming to counts V, VI, IX, and X, which involve Woodard Lot No. 107694, did you order the estradiol which was used in the manufacture of that lot number? A. Yes.

Q. And whom did you order it from or through, and when?

A. We ordered it from Silas & Co. on the 12th of December, 1949, to be shipped to Crest Laboratories.

(Testimony of John L. Sullivan.)

Q. How much did you order? A. 5 grams.

Q. And you had previously ordered of Crest Laboratories the manufacture of a quantity of these tablets? A. Yes.

Q. And what had you ordered, and when?

A. On the 12th of December, we ordered from Crest to manufacture 150,000 of the 22-microgram tablets.

Q. And also a quantity of 110?

A. Yes, and also a quantity of 110.

Q. Did you subsequently receive from Crest Laboratories a quantity of these tablets?

A. Yes. [47]

Q. When?

A. On January 9, 1950, we received 142,500 of the 22-microgram tablets.

Q. And you also received a quantity of the 110, did you? A. Yes.

Q. Then, the tablets that you received from Crest Laboratories, did you receive them already in the packaged form?

A. No. They were in bulk form.

Q. In bulk form. And then what did you do with them?

A. We tableted them—or we packaged them in our packaging department and then labeled the packages.

Q. And shipped them on the dates and to the consignees mentioned in the information?

A. Yes.

Q. And which is the subject of our stipulation here? A. Yes.

(Testimony of John L. Sullivan.)

Q. Now, did you receive in 1950 a notice of hearing from the Food and Drug Administration here in Los Angeles, addressed to Woodard Laboratories, having to do with a claim that certain products had been picked up from Lot 497567 and Lot No. 897618, and that they were below the labeled potency? A. Yes.

Q. And a hearing on that subject was had, was there? [48] A. Yes.

Q. Now, after that hearing—or before I get to that: Subsequently there was another hearing, was there not, involving Lot No. 107694? A. Yes.

Q. That is, a couple of months later?

A. Yes.

Q. And you had a hearing on that, did you?

A. Yes.

Q. After having attended these hearings, or after having received these notices, did you contact any laboratories with respect to having samples of these lot numbers involved assayed, for the purpose of determining the amount of estradiol present in the tablets? A. Yes.

Q. Whom did you first contact?

A. We first contacted Adam's Laboratory of New York.

Q. Brooklyn, New York?

A. No. New York City.

Q. And did you send a quantity of tablets back to Adam to be assayed? A. Yes.

Q. Did you contact any other laboratories?

A. Yes.

Q. Who are they? [49]

(Testimony of John L. Sullivan.)

A. Bio-Science Laboratories, the Shankman Laboratory of this city, the Truesdail Laboratories of this city, and I mentioned the Bio-Science Laboratories of this city.

Q. And sent samples of some of the tablets involved in these three lot numbers for assay?

A. Yes.

Q. Did you request of the Food and Drug Administration information as to the method of analysis that they had used in connection with the charges made? A. Yes.

Q. And did you receive from them a letter with some literature attached to it? A. Yes.

Q. I show you here a letter on the letterhead of the Food and Drug Administration, dated September 21, 1950, with some reprints, a couple of reprints, attached to it, the whole, however, being clipped to a sheet of binder paper. With the exception of the binder papers are those the documents you received from the Food and Drug Administration in response to your request?

A. Yes.

Mr. Elson: I offer these for identification as the defendants' first exhibit in order.

The Court: It may be so marked.

The Clerk: Defendants' Exhibit A for identification. [50]

(The documents referred to were marked Defendants' Exhibit A for identification.)

Q. (By Mr. Elson): Does the Woodard Laboratories do any manufacturing themselves?

(Testimony of John L. Sullivan.)

A. We manufacture a few ointments and some liquids.

Q. Pardon me?

A. A few ointments and some liquids.

Q. But tablets such as these, you do not?

A. No, sir.

Mr. Elson: Cross-examine.

Cross-Examination

By Mr. Klinger:

Q. Let us see if we can get some of the chronology straight, Mr. Sullivan. When did you receive the notice of hearing that has been referred to, in 1950, do you remember?

A. Offhand, I couldn't tell you. I would have to check the letters. It was in the early part of 1950.

Q. And these requests for assays or analyses that you have spoken of, to Adam Laboratory, Shankman, Truesdail, and Bio-Science, those requests, they were all made after the receipt of this notice of hearing? A. Yes.

Q. From the Food and Drug Administration?

A. Yes.

Q. You had requested no analysis or assay from any of [51] these laboratories, or any other, prior to receiving this notice of hearing, is that right?

A. Not on these tablets, no.

Q. Yes, I mean on these tablets. A. Yes.

Q. Which are the subject of this case; you had not? A. No.

(Testimony of John L. Sullivan.)

Q. Now, if I understand the chain of supply correctly, your testimony is, I take it, that the alpha-estradiol which went into the tablets which are the subject of this litigation came to Crest Laboratories from International Hormones Company in New York, from whom they had been ordered by Silas & Co., to whom you had sent the order, is that right? A. That is right.

* * *

Q. (By Mr. Klinger): So that, that material, that alpha-estradio, was not supplied by Crest Laboratories, was it? A. No.

Q. They then put together the tablet, is that what they did? A. That is right, yes.

Q. And sent it to you? A. Yes. [52]

Q. And then you packaged it and put a lot number on each of the batches, is that it?

A. Yes, we put a lot number on each individual package.

Q. Yes, but the same lot number goes on each package where the tablets come from, a particular batch, don't they? A. That is right, yes.

Q. Let us take one of these lot numbers. Take the first one that is mentioned, No. 497567. Now, how do you interpret that lot number? I mean does the first number mean something?

A. Yes.

Q. And the second number means something?

A. Yes. They do. The first number refers to the month and the second number to the year, and the

(Testimony of John L. Sullivan.)

others are all in sequence that we keep a booklet in the packaging department.

Q. So that those packages which bear Lot No. 497567 would mean, under your system, that that batch of material or those tablets, all those stamped with that number were received by you in April of 1949 and they were the 7,567th shipment or item received by you since the time you went into business, is that it?

A. Well, I wouldn't say since the time we went into business, but since the time we inaugurated this particular type of lot number. [53]

Q. And every shipment received from Crest at one time would bear this same number?

A. No. Well, everything that came in that one shipment.

Q. In the one shipment?

A. The same tablets, of course.

Q. You would not remember the dates that you asked these various laboratories to make assays for you, would you?

A. I could give you the approximate dates.

Q. Well, let us see how approximate you can make them.

A. The Adam Laboratory's was somewhere around the latter part of May.

Q. Late in May, and that was in 1950?

A. 1950.

Q. OK.

A. And then again the latter part of July we requested analysis, and that was in 1950; and then

(Testimony of John L. Sullivan.)

again, approximately the first part of September of 1950; and then, the latter part of October, 1950.

From the Shankman Laboratory, the latter part of May, 1950, and approximately the middle of June of 1950, and then the latter part of June, 1950.

From the Truesdail it was somewhere around the middle of July of 1950.

And from Bio-Science Labs, well, in the latter part of October of 1950. [54]

Q. Only one from Bio-Science Labs, is that correct? A. Yes.

Mr. Klinger: Mark this, please.

(The documents referred to were marked Plaintiff's Exhibit No. 2 for identification.)

The Clerk: Plaintiff's Exhibit No. 2 for identification, marked.

Q. (By Mr. Klinger): Mr. Sullivan, showing you Plaintiff's Exhibit No. 2 for identification, which is a group of letters, I will ask you to examine them, so that you can recognize them and so there will be no problem about the fact that they were either sent by you or received by you.

(The witness examines said documents.)

A. Yes, yes, yes.

Q. So that, in each case, you recognize each of these letters as either being sent by you——

A. That is right.

Q. ——or having been received by you——

A. That is right.

(Testimony of John L. Sullivan.)

Q. ——in the regular course of your business, is that right? A. That is right.

Mr. Klinger: One of these is a photostat, your Honor, but I understand that, if they are offered later, there will be no objection to that fact. [55]

* * *

Mr. Elson: The next thing we have in our order of proof is a deposition which Mr. Klinger and I have decided the best way to handle is for one of us to be the attorney and the other be the witness, and inasmuch as I was the attorney who took the deposition I will assume my prerogative, if I may.

The Court: Very well.

Mr. Klinger: Shall I take the stand, your Honor?

The Court: All right. [58]

* * *

"HARRY ROSENZWEIG

was sworn and testified as follows:

"Direct Examination

"By Mr. Elson:

"Q. Will you please state your name for the record?

"A. Harry Rosenzweig. I am production chemist for International Hormones, Inc.

"Q. You are connected with the International Hormones, Inc? A. Yes, sir.

"Q. And in what capacity at the present time?

"A. Production chemist.

(Deposition of Harry Rosenzweig.)

"Q. How long have you been associated with that company?

"A. Since its inception, in 1940, I believe.

"Q. And your occupation is that of chemist?

"A. Yes.

"Q. Where did you receive your education?

"A. Bachelor's Degree at City College of New York, 1939; Master's Degree, Ohio State University, 1940.

"Q. That is in chemistry? [60]

"A. Yes, that is chemistry; I did some graduate work in Brooklyn Polytechnic Institute, in 1941.

"Q. What are your duties there as production manager?

"A. Well, I am in charge of production of hormones we manufacture there and the preparation of the solutions which are ordered by our various customers.

"Q. Now, then, calling your attention to Woodard Laboratories, one of the defendants in this case, did you on or about April 20, 1949, receive an order, Number 6847, from them? A. Yes.

"Q. And what was that for?

"A. That was for four point five grams of Alphaestradiol.

"Q. What was the date?

"A. We had a supply on April 20, 1949.

"Q. When did you get the order number?

"A. We have the date here, on the control sheet, 4/18/49. As to when it was made up for shipment to Woodard Lab——

(Deposition of Harry Rosenzweig.)

"Q. Would you say that you had received the order number that I mentioned, from them, on or about April 18, 1949? A. That's right. [61]

"Q. Did you give to that order number an order number of your own?

"A. We have an order number, J-1270.

"Q. And did you give to that a control number?

"A. Control Number 494.

"Q. Did you conduct any test of that material before sending it out, to determine the melting point?

"A. Yes, we determined the melting point of the material to a point between the range of 173 to 175 degrees.

"Q. Degrees what? A. Centigrade.

"Q. And what else did you do?

"A. Optical rotation, Alpha D—for what they designate it as a—ranges were within the range of 76 to 83 degrees.

"Q. And then you supplied that material?

"A. Yes.

"Q. When was that supplied?

"A. On or about April—on the control sheet it was April 18; it went out, I imagine, about April 20.

"Q. Did you receive, after that, another order from Woodard Laboratories, bearing number of 08424? A. Yes.

"Q. And what was that for? [62]

"A. That was, again, for four point five grams of Alpha Estradiol.

(Deposition of Harry Rosenzweig.)

"Q. Did you give that an order number?

"A. Yes. Control Number 498.

"Q. And what order number of your own?

"A. J-1493.

"Q. And did you conduct a similar test?

"A. A similar test.

"Q. And what did you find?

"A. The result the same as the previous one.

"Q. Did you, later, receive another order number from Woodard Laboratories, bearing number 08843? A. That's right.

"Q. And what was that for?

"A. Again, for Alpha-estradiol.

"Q. How much? A. Five grams.

"Q. And approximately the date of that order number?

"A. We have it down here as 11/16/49. This material was sent to stock on the Coast from which the material was drawn by our agent out on the Coast and supplied to Woodard Laboratories.

"Q. Did you give to that an order number of your own? [63]

"A. Yes, we have Order Number J-1765.

"Q. What control number?

"A. And Control Number 4911.

"Q. And did you conduct a test with relation to that?

"A. Yes, a slightly higher melting point—174 to 177.

"Q. Degrees?

"A. Yes, Centigrade. Optical rotation within the same range.

(Deposition of Harry Rosenzweig.)

"Q. And when was that order supplied, approximately? A. December 12.

"Q. 1949? A. That's right.

"Q. I don't think I asked you with relation to the second order number that you got, the date that that was supplied?

"A. That was supplied on August 15, we have it here—on or about the 15th day of August, 1949.

"Mr. Elson: You may cross-examine the witness.

"Cross-Examination

"By Mr. Sharison:

"Q. Mr. Rosenzweig, who made these tests that you just referred to? A. I did.

"Q. Personally? [64] A. Yes.

"Q. Do you have a record of when you made them and what period of time it took you to make them?

"A. It is on the control sheets. We checked the samples before we sent them out, that's all.

"Q. Tell us when you made those tests in each case and the length of time it took you to make them and tell us further whether you made them personally, or whether anybody else helped you make them.

"Mr. Elson: I must object to that.

"Q. (Continuing): I will repeat that; will you please tell us, Mr. Rosenzweig; first, in relation to the tests that you have described, whether you made them alone or whether others helped you to make them?"

(Deposition of Harry Rosenzweig.)

Mr. Elson: I remember the question, as he had it before I made the objection, was objectionable to me. However, he continued and the defect was clarified so far as I was concerned.

"A. Well, I can't—you see, the procedure in our laboratory—one man may perform the test while another one checks his findings. I made the test and Mr. Forman checked my findings.

"Q. In each case? A. In each case.

"Q. Now, tell us when you and Mr. Forman made [65] each test and the duration that it took to make them?

"A. Well, on J-1270, that was 4/18/49, on our control record, Alpha-estradiol was tested for melting point, which test may take fifteen minutes.

"Q. Excuse me, Mr. Rosenzweig, that is not my question. I am asking you how long it took you.

"A. I say it took me about fifteen minutes to determine the melting point of the Alpha-estradiol.

"Q. What quantity of the Alpha-estradiol that you sent to Woodard Laboratories did you make the test on?

"A. We have a batch of Alpha-estradiol from which we are going to send Woodard Laboratories a small sample, a small amount. The small sample is taken in a capillary tube, inserted into the melting apparatus, and a reading taken on it as to when the material melts. The duration of the test is fifteen minutes, approximately.

"Q. Referring specifically to your shipment order, J-1270, which, according to your testimony,

(Deposition of Harry Rosenzweig.)

you supplied, or shipped, on April 19, 1949, what procedure did you use in connection with making an analysis of that material?

"A. I said we took a sample of this material, put it in a capillary tube and inserted it in the apparatus [66] and checked the melting point."

Mr. Elson: Could I stop for a moment, your Honor? [67]

* * *

November 7, 1951—1:30 P.M.

Mr. Elson: Your Honor, I believe I am correct in my understanding of the rules. In any event, my understanding is this: in order for the point to be urged on appeal in a criminal case concerning the insufficiency of the evidence, a motion must be made at the close of the Government's case for a judgment of acquittal, as well as a motion at the close of all the evidence, regardless of in what state the evidence might be at the close of the Government's case. I overlooked doing that. However, I talked to Mr. Klinger, and Mr. Klinger stated he would be willing to stipulate with me that it be deemed that the motion was made at the close of the Government's case.

The Court: Very well. It is deemed that the motion for——

Mr. Elson: For judgment of acquittal.

The Court: ——for judgment of acquittal was made. I think you have in mind a jury case.

Mr. Elson: No, no. The rules do not specify either one, but there is at least one case that I know

of that holds that the same thing applies even in a case before the judge alone. I don't have the citation here, but it is in Barron and Holtzoff, in the annotations under that rule.

Mr. Klinger: In any event, we will stipulate that it may be deemed to have been made. [68]

The Court: The point is, at the conclusion of the case the court would rule on the evidence.

Mr. Elson: That is right. I don't see the sense in it, but, anyway, that is what the rule is.

The Court: It applies anyway, and, of course, in a jury case it means something.

Mr. Elson: That is right. It doesn't in a case like this.

The Court: At any rate, to protect your record, I will accept your stipulation. And, ordinarily, of course, where the motion is made in a jury case, the court would reserve ruling, and as to that, ruling is reserved.

Mr. Elson: And one other thing—Mr. Klinger and I spoke about this when I received this deposition back: that is, the reporter appended no certificate to his deposition certifying that the witness had testified, and so on. Now, Mr. Klinger has been kind enough to agree to stipulate with me that the deposition may be used in the absence of such certificate.

Mr. Klinger: It is so stipulated, your Honor.

The Court: That is satisfactory.

(And thereupon the reading of the deposition of Harry Rosenzweig was resumed as follows:)

(Deposition of Harry Rosenzweig.)

By Mr. Elson:

"Q. Did you take the sample from a bulk [69] amount and then, after you had made an analysis of the bulk amount, then you took a quantity of the bulk amount and sent it to Woodard Laboratories?

"A. That's right.

"Q. From what bulk amount did you take the sample?

"A. On this control sheet I can't tell you. It might have been reported fifty or one hundred grams of material from that same lot number. On this J-number, there were four point five grams of this material that were removed and shipped to Woodard Laboratories.

"Q. Do I understand you correctly to say that at one point you took a sample from the bulk of a batch of Alpha-estradiol and you sampled it?

"A. That's right.

"Q. And analyzed it in the way you described before? A. Yes.

"Q. And then, at some subsequent time, you took four or five grams which was being shipped to Woodard Laboratories and then shipped this, is that it? A. Yes.

"Q. Now, when in point of time did you make the analyses of the bulk amount with relation to the date of this material being supplied to the Woodard Laboratories, on April 19, 1949? [70]

"A. Let me rephrase it before I answer it: you want to know when the bulk material was tested

(Deposition of Harry Rosenzweig.)

prior to our shipping of this material to Woodard Laboratories—I couldn't say exactly—I would have to check through the records in the Laboratory to see when that bulk amount was tested. On these control sheets we have the records of the date shipment of the particular lot and what the controls for that material was.

"Q. So you cannot tell us at this time when you analyzed the sample from the bulk quantity of Alpha-estradiol? A. The exact date?

"Q. Yes? A. No, I cannot.

"Q. You don't have the records to show as to when you made the analysis of the sample?

"A. No, I have not.

"Q. Now, during your testimony, you said that you conducted the test when the analysis was made. Is it a fact, though, that you in every case personally made the analyses? A. Yes.

"Q. But you cannot tell us the date?

"A. No.

"Q. Can you tell us with respect to the [71] other two shipments of Alpha-estradiol made to Woodard Laboratories, can you tell us who made the analyses of those shipments?

"A. No, I could not.

"Q. Did all the shipments come from the same bulk amount?

"A. No, they are different lot numbers which would represent different bulks tested.

"Q. You didn't give us any lot numbers in your testimony. A. Yes, I did.

(Deposition of Harry Rosenzweig.)

"Q. Will you please repeat them?

"A. I have lot number—they were called control numbers—Control Number 494, Control Number 498.

"Q. Which shipment is 498?

"A. 08424, from Woodard.

"Q. And that is Control Number——

"A. 498.

"Q. And the order?

"A. 088443, Control Number 4911.

"Q. 4911? And by Control, you mean some bulk amount that you kept as your number of your bulk merchandise, is that correct?

"A. Yes, that would be correct.

"Q. Now, Mr. Rosenzweig, did you have anything to [72] do with the packaging of this material that went to Woodard Laboratories?

"A. Well, up to this point, that I did weigh out the material from the bulk amount and put it into the bottle, see that the correct label was on it, check the label and hand it over to our shipping clerk for shipment.

"Q. Do you have a copy of the same label that you placed upon the bottle?

"A. No, I have not.

"Q. Will you give us, in as much detail as you can, what matter, printed or written matter, was on the label?

"A. It would have: Alpha-estradiol.

"Q. Is that printed or written?

(Deposition of Harry Rosenzweig.)

"A. That would be printed. There is nothing written except quantities, or melting points.

"Q. Would that be printed or typewritten?

"A. No. That is, all things would be typewritten on the label. The girl would be given the specifications of the material and she would type a label which label would be checked by myself to see that it meets the tests which I have performed upon it and that label would, in turn, be put on the bottle and would be handed over to the shipping clerk for shipping. [73]

"Q. Who would actually—physically—place the label upon the bottle?

"A. I most likely would; or I would say "Put this label on," and have the boy put it on, but I did check the label against the specifications and also against the order.

"Q. You have no proof as to whether you personally placed the label on the bottle?

"A. No, I have not.

"Q. Would the label have on it the name, International Hormones, Inc.? A. Yes.

"Q. And what would be the size of the label?

"A. Maybe about an inch and a half, about two inches by one and one-half inches, something like that.

"Q. And besides the printed matter, International Hormones, Inc., was there anything else printed on any of the labels which would relate to these shipments?

"A. Well, you have the assay number showing our order number for this material, it would have that.

(Deposition of Harry Rosenzweig.)

"Q. Was that printed?

"A. Yes, printed or stamped upon the label; or it would have the name—that is, the name of the material.

"Q. Would that be printed or typewritten?

"A. Well, we have printed labels now; I don't know [74] about then—either printed or typewritten.

"Q. You don't have any reference as to whether they were printed or typewritten at the time in question?

"A. No, I don't know. And it would have the quantity of the material.

"Q. Would that be printed or typewritten?

"A. The quantity would have to be typewritten.

"Q. Do you have any proof of what happened to the shipments after it left your place of business? A. No.

"Q. None whatsoever?

"A. None whatsoever.

"Q. I think, in your testimony, you stated that the label contained information in connection with the tests you made prior to shipment?

"A. Yes. At that time, possibly—I am not sure now—the labels have changed many times since then, since that time—I am not sure, I don't remember at that time as to whether or not we put in the actual properties of the material. We may have put on it the melting point, and possibly——

"Q. You don't know what you might have had?

(Deposition of Harry Rosenzweig.)

"A. I can't say for sure. There was the quantity, and there was the name of the material in it, and the [75] J-number.

"Q. And you are not certain of anything else?

"A. No, I am not certain of anything else.

"Q. Let me ask you this question, Mr. Rosenzweig, you give us three control numbers from which you stated that—let me rephrase that—in your testimony you gave us three control numbers which you said are references to certain bulk amounts of Alpha-estradiol, is that correct? A. Yes, sir.

"Q. Did you have other bulk amounts of Alpha-estradiol, besides these three numbers which I refer to as 494, 498 and 4911? A. At that time?

"Q. Yes, sir, at that time?

"A. We might have had.

"Q. But you don't know?

"A. I can't tell, no.

"Q. What is your best opinion right now?

"A. There is a good possibility we may have had more than one batch at one time, we don't wait until the one batch is fully shipped out before we make up another batch of material.

"Q. You are telling us now that, at that time, you had three batches with those three [76] numbers?

"A. We may have finished one batch and made another batch after that had been sold.

"Q. So it is your opinion now at the time in question, which is the date of the shipments, you

(Deposition of Harry Rosenzweig.)

probably had one batch of Alpha-estradiol, and possibly you could have had at the same time two; is that correct? A. Yes.

"Q. Now, your company didn't manufacture the Alpha-estradiol? A. Yes, we did.

"Q. You did manufacture?

"A. Yes, we did.

"Q. What did you manufacture it from?

"A. Total natural estrogenic substance of high purity.

"Q. And did you personally produce the Alpha-estradiol from this substance? A. Yes, I did.

"Q. Did anybody help you? A. Yes.

"Q. Who? A. A lab boy in the place.

"Q. A lab boy? A. Yes.

"Q. What is his name? [77]

"A. Leon Cohen.

"Q. And did you have a practice of making a certain amount of Alpha-estradiol at one time?

"A. Yes, we'd run—it might run, usually, to about fifty grams in one batch.

"Q. And you would utilize that batch to supply customers, and when the batch was exhausted you would make up another batch?

"A. No, we would make up another batch prior to that batch being exhausted. This was in order not to leave ourselves depleted of material.

"Q. And would it be your usual custom to make fifty grams at a time? A. Approximately.

(Deposition of Harry Rosenzweig.)

"Redirect Examination

"By Mr. Elson:

"Q. Mr. Rosenzweig, on these order numbers—let us take them again. The first one, Woodard Laboratories 6847, when did you receive the order for that—that was Woodard Laboratories Order Number 6847? A. On or about April 20.

"Q. And when did you supply that material to Woodard Laboratories—that is, shipped?

"A. On or about that date.

"Q. Take the next order number, Woodard's Order [78] Number 08424, when did you receive that order from Woodard Laboratories?

"A. On or about August 15, 1949.

"Q. And when did you ship that to Woodard?

"A. On or about that date.

"Q. When did you receive Woodard's Order Number 08843?

"A. On or about the 16th of November—no, it was something else—this order, Number 08843, was supplied from stock of materials which were supplied to our representatives on the Coast, Mr. Silas. This material was sent to Mr. Silas on 11/16/49, and he, in turn, supplied five grams of this material to Woodard Laboratories on December 12, 1949.

"Q. Now, then, can you tell us approximately when you conducted your test to determine the melting point, and so on, of that last one?

"A. On or about the 16th day of November, 1949.

(Deposition of Harry Rosenzweig.)

"Q. Would that be about the day of shipment to Mr. Silas? A. Yes.

"Q. Now, with reference to the two other Woodard Laboratories orders: Woodard Laboratories Order Number 6847 and Woodard Laboratories Number 08424, when was the similar test made by you? [79]

"A. On or about the date of shipment, I would say.

"Q. Now, the United States Attorney here asked you something about control numbers. Solely for the purpose of clarifying it in the record, do you assign a control number to each batch of the product you manufacture? A. Yes, sir, we do.

"Recross-Examination

"By Mr. Sharison:

"Q. Mr. Rosenzweig, when I examined you in connection with your order number J-1270, and asked you whether you could testify with any degree of certainty when you made the analysis of that batch of Control Number 494, you said you could not.

"A. I say on or about that date; it might be plus or minus days after that.

"Q. Did you make the test at the time you manufactured the batch? A. Yes.

"Q. And did you manufacture the batch on April 18, 1949?

"A. I say no, we did not manufacture at that

(Deposition of Harry Rosenzweig.)

point; I do not test the material on the day I manufacture because it is more than a one-day operation. I may start to manufacture the material on a [80] Monday and finish it on a Wednesday and test it on a Thursday and ship it out on a Thursday. So I can't say for sure as to the exact date as to when I tested this material prior to shipment. It might have been on the date of shipment, and it might have been prior to the date of shipment.

"Q. Can you tell us in connection with your Control Number 494, when you made up that batch, did you make it up especially for Woodard Laboratories, especially to supply Woodard Laboratories?

"A. I couldn't say; no, it was too small an amount just for Woodard Laboratories.

"Q. How can you testify with respect to your Order Number J-1270 representing your shipment to Woodard Laboratories, on or about April 20, 1949, when you made your batch which you number Control Number 494, since you didn't make the batch up especially for the purpose of supplying Woodard Laboratories?

"A. If I mentioned an exact date, say it was tested on this exact date, then it wasn't—I was wrong, it was a wrong statement. It should be on or about, approximately on or about that date, approximately, around the date of shipment is when the test was made.

"Q. Actually, did you know because you might have [81] made the batch up a month before that?

(Deposition of Harry Rosenzweig.)

"A. No, it couldn't have been a month before; I don't think the material would last that long.

"Q. You were supplying other companies besides Woodard Laboratories?

"A. That's right.

"Q. Outside of that Alpha-estradiol?

"A. Yes.

"Q. And you didn't make that batch up especially to supply the Woodard Laboratories?

"A. No, we didn't.

"Q. So you cannot say that you made the batch up immediately prior to the order which you received from Woodard Laboratories, which was approximately April 20, 1949?

"A. Well, I know, because the preparations made were of small quantity, small amounts that could never have lasted a month's time.

"Q. But you do not know——

"A. No, I would not know.

"Q. One more question. On this control batch that you have given the number of as 4911, it is my recollection that you testified that you sent that material on November 16, 1949, to Mr. Silas?

"A. That is correct. [82]

"Q. Your California representative?

"A. That is correct.

"Q. What was the quantity of that batch?

"A. At that time, we sent him 15 grams of material in three 5-gram bottles.

"Q. And you testified that Mr. Silas sent to Woodard Laboratories 5 grams on December 12, 1949? A. That's right.

(Deposition of Harry Rosenzweig.)

"Q. Well, you don't know that to be a fact?

"A. Yes, I do. He sent the order in to us on that date.

"Q. Do you actually know whether Mr. Silas atually sent that batch to Woodard Laboratories on December 12, 1949—do you actually know that?

"A. Not physically—no.

"Q. You weren't there? A. No.

"Q. So you don't actually know?

"A. No, I don't exactly know.

"Mr. Elson: No further questions."

Mr. Elson: Now, your Honor, this fellow back there attached here two depositions. There were two depositions taken at that proceeding, one of them being of a woman by the name of Elizabeth Adam, whose name you have heard in the testimony here as one to whom samples of some of these lot [83] numbers were sent for analysis.

Now, I am not going to offer the testimony of Elizabeth Adam. I am not going to offer it for the reason that, by reason of subsequent examination and investigations here, I am satisfied that the woman's conclusions were incorrect, and for that reason I am not going to offer it.

The Court: Very well.

Mr. Elson: Mr. Galindo.

JOSEPH G. GALINDO

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Elson:

Q. Mr. Galindo, you are connected with the Crest Laboratories in Burbank, are you not?

A. That is correct.

Q. And in what capacity?

A. I am vice-president of Crest Laboratories.

Q. What was your answer?

A. I am vice-president of Crest Laboratories.

Q. And do you have anything to do with the laboratory itself? A. Yes, I have. [84]

Q. What is that?

A. I am supervisor, co-ordinator of laboratory.

Q. At the time of the manufacture of the products that are involved in this litigation, with which you are familiar, of course, what was your position with the company?

A. At that time, I was production manager, along with being vice-president.

Q. Now, what is the character of the business of Crest Laboratories?

A. We are engaged in private-formula manufacturing, pharmaceutical manufacturing; that is, we prepare pharmaceutical and drug products for distributors, to be sold by distributors under their own

(Testimony of Joseph G. Galindo.)

labels. We do not ourselves sell or distribute our own products.

Mr. Elson: I am going to make an inquiry of the court here. I do not want to unnecessarily take time and I don't want the court to commit itself in advance on anything. I will go ahead and ask the questions, and if there is an objection to them and if the court thinks it is immaterial, I can be advised.

Q. In the manufacturing plant, I take it you have certain equipment that is used in pharmaceutical manufacturing?

A. That is correct. It is a standard production equipment used in pharmaceutical manufacturing.

Q. How many people do you have employed at the plant [85] itself, doing the actual work?

A. At the present time there are probably about 35 people.

Q. And you have tableting machines that make tablets? A. That is correct.

Q. And do you have one or more than one?

A. There are several. There are about six or seven tableting machines, rotary tablet presses.

Q. And you have an encapsulating machine, do you? A. Yes, that is part of the equipment.

Q. Do you have one or more than one?

A. There is one encapsulating machine.

Q. In the testing laboratory itself, you know what I mean— A. The analytical laboratory.

Q. Yes. Can you tell me approximately the number of square feet that that would occupy?

(Testimony of Joseph G. Galindo.)

A. The analytical control laboratory occupies somewhere between 2,500 and 3,000 square feet.

Q. How many people do you have employed in that?

A. There are about seven people employed in the laboratory itself.

Q. Do you have a director of that laboratory?

A. Yes.

Q. Who is that? A. Mr. Atkins. [86]

Mr. Elson: I will just reserve the other questions on that until I come to him, I think.

Q. Did you attend a school?

A. College, university.

Q. Where?

A. University of California at Los Angeles.

Q. In what period of time?

A. 1938 to 1940.

Q. And did you have a major?

A. Chemistry.

Q. Did you attend a short course, or a course, rather, in chemical engineering at U.S.C.?

A. That is correct.

Q. And in what year?

A. That was in the early part of 1941.

Q. What was the duration of the entire course?

A. Where, sir?

Q. At U.S.C. A. Six months.

Q. In 1946, you became associated with Crest Laboratories? A. That is correct.

Q. And you have been connected with them ever since? A. Ever since.

(Testimony of Joseph G. Galindo.)

Q. Do you belong to any chemical societies [87] or organization of that sort? A. Yes, I do.

Q. And what are they?

A. The American Chemical Society, the American Pharmaceutical Association, the American Association for the Advancement of Science, the Medical Research Association of California. Offhand, that is about all.

Q. Do you belong to the Institute of Food Technologists?

A. That is true, the Institute of Food Technologists. I am a member of that institute.

Q. The Crest Laboratories publishes "Crest Comments," do they not? A. Yes.

Q. What is the nature of that publication?

A. The object of this publication is to disseminate some of the other medical and pharmaceutical knowledge that appears in the journals, and it is distributed to our accounts and to anybody else that is interested. It goes to companies in allied fields, for instance, Merck, American Cyanimide; it goes to companies like Merck, American Cyanimide, Phizer, and laboratories of Squibb, Parke Davis, and so forth.

Q. Have you had anything to do with the preparation of that publication?

A. That is part of my duties today, the preparation of the Crest Comments. [88]

Q. In your work, have you at any time been consulted by other manufacturers of pharmaceuti-

(Testimony of Joseph G. Galindo.)

cals of this area, in connection with pharmaceutical practices or problems?

A. Yes. From time to time, I am consulted on manufacturing problems.

Q. In your opinion, from your knowledge of this field, would you say the methods of manufacture employed by Crest Laboratories at the time these products were made were according to the accepted standards in the field? A. Yes.

Q. In connection with your work, have you made any trips East, in consultation or study of methods employed by some of the well-known large houses, such as Merck, Lilly, and so on?

A. Yes. That is under my category, since new developments certainly keep coming into the field and it is important that we keep abreast of these. We attempt to make a yearly trip and contact the large suppliers, as well as these pharmaceutical manufacturers, in our type of business.

Q. Now, taking the products here in question, did you bring with you some work sheets?

A. Mr. Sullivan, I believe, has some work sheets.

Q. I am going to hand you these work sheets, because you will be able to identify them better than I can. I better ask the questions. (Handing documents to the witness.) [89]

Calling your attention to Woodard Lot No. 497567, which is the subject of Counts I, II, VII, and VIII of the information, did you, on or about April 29, 1949, send an invoice to Woodard Laboratories reflecting your charges for the manufac-

(Testimony of Joseph G. Galindo.)

ture of approximately 143,500 Estrocrine tablets of the potency of 22 micrograms per tablet?

A. That is correct.

Q. On the same day, did you send your invoice to Woodard Laboratories reflecting your charges for the manufacture of approximately 9,500 tablets containing 110 micrograms of extradiol per tablet?

A. Yes, sir.

Q. Prior to the manufacture of those products for Woodard Laboratories, did you receive an order from them for the manufacture of the 22-microgram and the 110-microgram tablets?

A. Yes, we did.

Q. In connection with those two products, the 22- and the 110-microgram, did you receive some estradiol from someone for use in the manufacture of them? A. Yes, we did.

Q. When did you receive them, and from whom?

A. That alpha-estradiol was received from International Hormones. The amount was four and one-half grams, and that was received on April 25, 1949. [90]

Q. And was that used in the manufacture of both the 22- and 110-micrograms?

A. That is correct, on these two sheets.

Q. After you received it, you went ahead and manufactured these tablets? A. That is right.

Q. What was your control number for the 22-microgram tablets?

A. The control number for the 22-microgram tablets is 2571.

(Testimony of Joseph G. Galindo.)

Q. All right. Now, would you just set that aside there.

In connection with Woodard Lot No. 897618, which is the subject of Counts III and IV, did you, or did Crest Laboratories, on or about August 22, 1949, send to Woodard Laboratories its invoice representing the manufacture of approximately 99,000 Estrocrine tablets of a 22-microgram potency, and 20,000 tablets of 110-microgram potency?

A. That is correct.

Q. What was the Crest control number for the 22 micrograms? A. 2800.

Q. Would you set that work sheet aside?

And you also manufactured the 110?

A. That is correct.

Q. And you have a control number for [91] that? A. Yes.

Q. And you have a work sheet there before you, I think, on that, don't you?

A. That is correct.

Q. I do not wish to confuse you. I am not going to have you put that over with the others, with the little pile that you made there, because the 110 are not involved in this lawsuit.

Prior to the manufacture of these products, you had, of course, received an order from the Woodard Laboratories, to make them?

A. That is correct.

Q. Can you tell me when you received the order and for how much?

(Testimony of Joseph G. Galindo.)

A. The order for the Lot No. 2571, which represents 22-microgram alpha-estradiol tablets——

Q. Wait a minute. What lot number?

A. 2571.

Q. What control number is that?

A. Well, that is the Woodard Order No. 6849.

Q. Wait a minute. Are you sure you are correct there? I do not want to get the record confused here. Let us go back a minute.

I am talking about—we started, first, on or about August 22, 1949, when Crest Laboratories sent its invoice to [92] Woodard Laboratories.

A. All right.

Q. That invoice was what number?

A. Our invoice on that lot number, our invoice number?

Q. Yes. A. Pardon me. 4000Q.

Q. Now, then, can you tell me the order number that you had previously received from Woodard, which eventually caused the sending of that invoice?

A. That is 6989.

Q. And when did you receive that order number? A. August 15th.

Q. And that was for what, Mr. Galindo?

A. That represented an order for approximately a hundred thousand, or a hundred thousand 22-microgram alpha-estradiol tablets.

Q. And also for the manufacture of some 110?

A. Yes, sir.

Q. Did you receive some estradiol which was to be used in the manufacture of the products, the subject of those order numbers?

(Testimony of Joseph G. Galindo.)

A. That is correct.

Q. When did you receive it?

A. That was received on the 17th of August.

Q. From whom? [93]

A. From Silas & Co.

Q. How much?

A. Four and one-half grams.

Q. In accordance with Woodard Lot No. 107694, which is the subject of Counts V, VI, IX and X, did you, on or about January 9, 1950, send an invoice to Woodard reflecting the manufacture by you of 142,000 Estrocrine tablets of a 22-microgram potency? A. That is correct.

Q. And you assigned to that what control number? A. 3180.

Q. Do you have the work sheet on that?

A. Yes, sir.

Q. Would you set that over aside, too?

Did you send an invoice to Woodard Laboratories reflecting charges for the manufacture of some 110-microgram tablets? A. That is correct.

Q. And what was the control number there?

A. That control number is 3181.

Q. Prior to the manufacture of those products, you had received an order from Woodard Laboratories ordering the manufacture of those tablets?

A. That is correct.

Q. Will you tell me on what date you received them and for what tablets? [94]

A. The order for both of those tablets, that is,

(Testimony of Joseph G. Galindo.)

the 22 and the 110 micrograms, was received on December 12, 1949.

Q. And did you receive some estradiol to be used in the manufacture? A. That is correct.

Q. When did you receive it?

A. That was received at the same time, on the same date, December 12, 1949.

Q. From whom? A. Silas & Co.

Q. And how many grams?

A. Five grams.

Q. Now, would you make a separate pile of your work sheets for control number 3181? Never mind. Let that go for now.

In connection with the manufacture of all of those tablets, work sheets were used from the inception, were they? A. That is correct.

Q. Is that standard practice in your laboratory?

A. That is standard practice.

Q. Is that standard practice everywhere else in the same kind of business, that you know of?

A. That is standard practice throughout the manufacturing.

Q. Now, would you look at work sheet bearing control [95] number 2571? May I see it?

* * *

Q. (By Mr. Elson): Was that work sheet control number 2571? A. That is right.

Q. Can you tell me when the order for that material was received by you, on or about what time?

A. The order for that was received April 19, 1949.

(Testimony of Joseph G. Galindo.)

Q. April what? A. April 18, 1949.

Mr. Elson: And for the purpose of the record there, that was in connection with Woodard Lot No. 497567, which is the subject of Counts I, II, VII and VIII.

Q. Now, do you have a work sheet bearing control number 2570? A. Yes, that is right.

Q. And I think you testified that the order for that material was received on what date?

A. On the same date, the 18th.

Q. And work sheet control number 2800?

A. That was received on August 15, 1949.

Q. And 2803? [96] A. On the same date.

Q. Do you have a work sheet there, control number 3180? A. That is correct.

Q. And what date was that received?

A. December 12, 1949.

Q. And 3181?

A. 3181, that was the same date, too.

Q. Now, Mr. Galindo, will you take the work sheets that have to do with the 22-microgram tablets and put them in one stack, and the work sheets that have to do with the 110-microgram and put them in another?

A. All right, sir. (The witness complies with Mr. Elson's request.)

Q. Now, then, in connection with all these work sheets, are they made up in the same fashion?

A. That is correct.

Q. Will you tell me how they were made up at

(Testimony of Joseph G. Galindo.)

their inception? How do you go about it, to make up a work sheet?

A. Well, the preparation of the work sheet itself is done in this fashion: It is my duty to prepare the formulation, that is, to decide on how the compounding, the various weights necessary for the making of a tablet, how that is to be done.

What I do is make the necessary calculations, listing the ingredients and their amounts needed, on a yellow columnar [97] pad, using that simply because it lends itself very well to that type of calculation.

This is then typed. It is typed now. At that time it was written out in longhand by Mr. Tutschulte. He would check my calculations.

Q. Who is he?

A. Mr. Tutschulte is our president, and at that time was manager, too. He would check my calculations on a calculator and make certain that they were correct.

He would then enter them into the work sheets that you see here, these forms that we use. And then they come back to me for a check, a recheck, to see that the ingredients agree with those that were listed in my original columnar pad, that the quantities are the same and that no mistakes have been made in the typing or, as I say, in the write-in into the method; as I say, they come back to me so that I can determine that all is correct in the form used for the work sheet.

Q. All right. Now, then, on those work sheets

(Testimony of Joseph G. Galindo.)

there are certain entries in ink and certain entries in pencil, are there not? A. That is correct.

Q. At what stage in the proceeding are the entries in ink made?

A. Those entries are made after I prepare my sheet, my columnar sheet, and they are done to prepare the work [98] sheet. This work sheet represents the sheet that is used at the plant for manufacturing.

Q. Now, I am referring to your control number work sheet 2571, and opening it up, on the right page appears a list under a column entitled "Raw Materials," commencing with "Estradiol," and so on down the line. Now, what does that list under "Raw Materials" indicate?

A. Those are the ingredients that constitute the tablet.

Q. And what are the figures that appear at the right, opposite those?

A. The amounts of these ingredients, the individual ingredients.

Q. Take that work sheet right there, now. What are the amounts of those ingredients? Strike that.

Take the first one, "Estradiol." Now, what is the amount of estradiol represented on there calculated to supply in the way of alpha-estradiol in the completed tablet? A. 22 micrograms—— [99]

* * *

Mr. Elson: I now offer into evidence as the defendants' next exhibit in order, Exhibit B, work sheet number 2571.

(Testimony of Joseph G. Galindo.)

The Clerk: Defendants' Exhibit B in evidence.

(The work sheet referred to was marked Defendants' Exhibit B and received in evidence.)

Mr. Elson: I offer next, as Exhibit C, work sheet number 2800.

The Clerk: Exhibit C in evidence.

(The work sheet referred to was marked Defendants' Exhibit C and received in evidence.)

Mr. Elson: Next, as Exhibit D, work sheet number 3180.

(The work sheet referred to was marked Defendants' Exhibit D and received in evidence.)

Mr. Elson: Now, those are work sheets having to do with the 22-microgram product, and the next three that I have to offer have to do with the 110, which are not the subject, however, of this litigation. [100]

As Exhibit E, work sheet number 2570.

(The work sheet referred to was marked Defendants' Exhibit E and received in evidence.)

Mr. Elson: As Exhibit F, work sheet number 2803.

The Clerk: Exhibit F.

(Testimony of Joseph G. Galindo.)

(The work sheet referred to was marked Defendants' Exhibit F and received in evidence.)

Mr. Elson: As Exhibit G, work sheet number 3181.

(The work sheet referred to was marked Defendants' Exhibit G and received in evidence.)

The Clerk: Exhibits B, C, D, E, F, and G, in evidence.

Mr. Elson: Will you read the last question, please?

(The question referred to was read by the reporter as follows: "Q. Take that work sheet right there, now. Take the first one, 'Estradiol.' Now, what is the amount of estradiol represented on there calculated to supply in the way of alpha-estradiol in the complete tablet?")

The Witness: 22 micrograms per tablet.

Q. (By Mr. Elson): Now, in making your calculations, still referring to Exhibit B, do you provide for any overage of estradiol?

A. Yes. There is an overage provided for there.

Q. How much? [101] A. Five per cent.

Q. Now, take Exhibit C, would the same thing be true with that?

A. That is correct. The same thing is true about that.

Q. And would the same thing be true with Exhibit D? A. That is correct.

(Testimony of Joseph G. Galindo.)

Q. Now, on these work sheets I notice some penciled entries. What do those mean? I mean, when were they made?

A. The penciled entries that are found on these work sheets were made during the time of the manufacturing, by the personnel.

Q. Well, for example?

A. At the time that the individual materials are weighed out, they are checked by the person that weighs them at the time that they are received in the calculating department or in the various departments. These checks and initials are made in pencil.

Q. Now, in connection with all of those work sheets—and I mean not only those having to do with the 22 micrograms but the 110 as well—were the steps in the manufacture all the same?

A. That is correct. They are all the same.

Q. I beg your pardon?

A. They are all the same.

Q. All right. Will you describe, now, the steps in [102] the manufacture of those products there?

A. Very simply, the manufacture of such a tablet consists of weighing the individual materials separately by a weighmaster, again being checked individually to verify their exact weight.

They are then turned over or sent to the mixing department where they are received and again checked, mixed in standard pharmaceutical mixing equipment. They are granulated, what we call wet-granulated, that is, a solution is added in order to

(Testimony of Joseph G. Galindo.)

produce a material of a suitable mesh in density. This wet mass is extruded and fed on tracings to dry, in a forced-draft house, and subsequently ground through a specified mesh, a certain mesh, and again mixed. Lubricants are added, and tableted. Once the lubricants have been added and mixed, the material is tableted on rotary tableting presses. That constitutes the manufacturing operation.

Q. By the way, the plant personnel, during the course of manufacture, receive the particular constituents that they are going to put into the mix from some one else, do they not?

A. From the weighing department, yes.

Q. Now, as to the weighing department, before that time, have they weighed the material itself?

A. That is correct.

Q. And the one who receives it does again weigh it? A. Yes. That is generally the case. [103]

Q. And after the manufacturing process is completed, then, of course, the tablets are sent in bulk form to the one who ordered them?

A. That is correct.

Q. Now calling your attention to January 27, 1951, at my request did you prepare a work sheet for the manufacture of about 7,000 tablets, each containing 22 micrograms of estradiol?

A. Yes, I did.

Q. Do you have that work sheet?

A. Yes, I do.

Q. And was that work sheet prepared in the

(Testimony of Joseph G. Galindo.)

same fashion that you testified about the manner of preparation of the others, or differently?

A. No. In identical fashion.

Mr. Elson: I offer this work sheet as Exhibit H in evidence.

Mr. Klinger: I will raise an objection to Exhibit H and the whole line sought to be established by that. I think, if I am correct, that the proof that is sought to be made is that at some time subsequent, after the manufacture of the tablets here in question—and this work sheet does not involve any of the shipments involved in this case—Mr. Elson asked the laboratory to make up a batch of similar tablets, and that they presumably made up such a batch and then sent that [104] batch out for examination and for analysis, and it seems to me that that certainly does not have sufficient probative force in a case of this kind.

The Court: What is your objection, that it is immaterial?

Mr. Klinger: Immaterial, irrelevant, your Honor, and incompetent.

Mr. Elson: Do you want to hear from me on that, your Honor?

The Court: Yes.

Mr. Elson: I had not intended to disclose exactly what I have in mind now, but I will. I might as well make an offer of proof. Shall I do that, your Honor?

The Court: Well, you might state the purpose of the proof.

(Testimony of Joseph G. Galindo.)

Mr. Elson: Well, I might state it in this way:

After I returned from New York, in my preparation and investigation, I began to doubt very much whether or not the U.S.P. XIV method for the assay of estradiol was suitable to the assaying of a product containing 22 micrograms of estradiol, with the excipients in it that this tablet contains.

That was not just an idea of mine out of the air, because I obviously do not know anything about assaying. So, in order to test whether or not, by making up what we call a placebo or an experimental tablet, containing the same excipients, made it exactly the same way and with the same [105] quantity, leaving out the estradiol, in other words, here we take a tablet which has no estradiol in it that is made in precisely the same way as the tablets in question, and, in other words, the work sheets correspond exactly—am I making myself clear?

The Court: I understand it corresponds exactly except for the alpha-estradiol?

Mr. Elson: That is right. The estradiol is left out.

Those blanks, as we call them, or placebos, are sent out to an investigator or to an entirely competent individual who takes them and he adds to them the same kind of estradiol, and mixes it up and runs an assay of it. He knows how much estradiol he has put in. Now, he then runs his assay, to see whether or not he is able to obtain or extract in the course of that assay all that he put in. If he doesn't, obviously, that is evidence that the assay

(Testimony of Joseph G. Galindo.)

is not suitable for the assay of that particular product containing those excipients and that amount of estradiol. Now, that is the purpose of it.

The Court: Is that the purpose of the offer?

The objection will be sustained. Even under your theory, while, of course, you might offer expert testimony here of other chemists and as a basis for their opinion they might state that they had made such investigation and such tests, that does not mean that they are admissible in evidence. I assume that you are arguing that they have made some. [106]

Mr. Elson: In other words, that is what these gentlemen here this morning testified to, that here they simulated this tablet in powder form, they used the ingredients that, according to standard practice, would be found in a tablet of this kind, they put in their estradiol, they ran their assay on it and they got it all out.

The Court: Yes.

Mr. Elson: Now, that is the purpose of their testimony. All I am going to do is tie this in, to show that exactly the same materials went into this tablet which were in the tablets in question, which in turn went over to this fellow.

The Court: You see the difference, Mr. Elson, that insofar as the materials are concerned, or what was done, it becomes important only when a person who is an expert testifies. For instance, if you have an expert here who is going to testify and attempt to show that the methods that were used by the

(Testimony of Joseph G. Galindo.)

Government's witnesses would not bring about an accurate result, he may testify, and as a basis for his testimony, like any expert, he may refer to tests that he made. Then he subjects himself to cross-examination, and the court then would decide it on the factual question. In other words, it is just like any other conflict in the evidence. You have certain witnesses testifying as to the efficacy of this test, and you have others who are testifying, from their experience, knowledge, and experiments, and so forth, that there isn't any [107] way of telling how much estradiol is in there. That is what you are going to have at the end, and it is for the court to determine where the truth lies. It is just like any other factual question.

Mr. Elson: I don't believe, your Honor, that I made myself clear. In other words, let us assume here that we have a fully competent man who gets up and testifies that he has run an assay with a blank tablet, that he put in the amount of estradiol, the same amount that we have involved here, that he ran a U.S.P. assay on it and that he was unable to obtain or extract or get out the full amount of estradiol that he put in.

Now, then, as soon as my experts get on here, we are going to have testimony that certain excipients or ingredients, such as starch and other things that are in the tablet tend to interfere with the extraction of the full amount of estradiol during this U.S.P. assay period, and they are going on to testify to other reasons why the U.S.P. method is

(Testimony of Joseph G. Galindo.)

not a suitable method for a tablet of this potency, with these excipients.

Now, in order for their testimony to be tied in, we have to show that the tablet that we sent to them is a tablet containing certain excipients in certain amounts. That is as far as that goes.

Then they say, "Yes, we received the tablets from the Crest Laboratories," and then they go on and say what they did with them. [108]

The Court: But, you see, as I stated before, as far as this test is concerned, that they have made, this witness takes the stand and apparently has testified as to the amount of alpha-estradiol that was placed in the particular tablets that are here in question.

Mr. Elson: That is right.

The Court: But it doesn't go to prove the amount of alpha-estradiol that was in the tablet itself at the time of shipment, in other words, the question that we have to determine here, because of course the court is faced with this position, if his testimony that that ingredient was placed in there is conclusive of the fact that it was in there at the time of shipment——

Mr. Elson: I do not mean that. That isn't my purpose.

The Court: Well, at any rate, the point of course is that the only place where the testimony has any value is where the expert himself testifies. You say you are going to call these experts?

Mr. Elson: Yes.

The Court: You may call the experts. You may

(Testimony of Joseph G. Galindo.)

call an expert and he may give his opinion, and in support of his opinion he may refer to tests which he has made and the results of those tests, and that he bases his opinion on that. When he does that, he perhaps would be subjected to cross-examination, and the court will then find his testimony tested [109] by the questions that you ask him and by the questions that are asked him on cross-examination. And, of course, that is the reason a judge need not be a chemist in order to pass upon a factual question, because the judge has an opportunity to listen to the chemist and see how he stands up under cross-examination by the questions that are asked him, so that the court can understand how much weight to put on the testimony of the particular person.

But it doesn't make any difference if a man comes in here and testifies that he believes that this method of analysis is not effective, and he believes it is not effective because of this and that, and he testified as to why, and the tests he has made, and all he needs to do is to relate it. If he says that he used some kind of an instrument, he does not have to bring the instrument into court here. If he knows he used certain ingredients, he does not have to bring the ingredients into court. He can testify as to those ingredients. The mere fact that someone wanted him to make a test—and apparently that is the background of this here, to establish that he was requested by someone to make a test, who made out a work sheet, and it isn't necessary

(Testimony of Joseph G. Galindo.)

for him to put the work sheet in—doesn't mean a thing.

Mr. Elson: All right, he didn't make a test, you understand that.

The Court: I realize that. As I understand it, someone [110] else made a test.

Mr. Elson: That is right.

The Court: But you had him submit a formula to him. I am not interested in the formula. I am interested in the testimony of the expert. When that expert testifies, I am not interested as to whether someone said do this and do that. When he testifies "I did this" and "I did that," with this ingredient and with that ingredient, and with this and that result, that is what I am interested in.

Mr. Elson: Your Honor, I don't want to argue with you, but an expert over here gets a tablet. We will say he does not know what the ingredients are in that tablet. He is asked to run an assay of that tablet to find out if there is any estradiol in it, and, if so, how much. The only purpose of this here is simply, as with the other work sheets, to show that a tablet was manufactured with certain things in it, at that time. Now, then, what this man over here finds on his test is something entirely different.

The Court: Well, I am not interested in his test, I am not interested in his test of some subsequent tablet which was made, because it is not material here.

If he has made a test of these particular tablets

(Testimony of Joseph G. Galindo.)

and then he is going to testify as to these particular tablets, as has been done by the chemists who have testified here now, of course that goes to the question as to what was in those [111] particular tablets. If he did not have and has not made a test of those particular tablets, if he is an expert that is going to testify here and not because someone told him there was a certain thing in a tablet, if he merely took a tablet and made an examination and an analysis and tests with that particular tablet, his testimony, as far as his testimony is concerned, would be entirely immaterial, because it is a different tablet.

Mr. Elson: Well, your Honor, I want to get myself clear on this: With this simulated experiment that the government experts testified to this morning, your Honor feels that that was material?

The Court: Yes. I feel that it is material, and I also feel that, as far as your witnesses are concerned, your witnesses can get on and testify.

You must keep in mind that these witnesses are testifying as to opinions, as distinguished from facts.

Mr. Elson: True.

The Court: And we have here a situation where we have opinion, so of course they are testifying to their opinions. The weight which the court can give that opinion rests largely upon the background for the opinion.

So, of course, an expert may take the stand and he may testify that, for instance, this method is

(Testimony of Joseph G. Galindo.)

ineffective for any purpose, he may be asked the reason why and he may say, [112] "Well, just because I don't like the way they do it." Is there anything to prevent him from testifying to that effect?

Mr. Elson: It wouldn't have much weight.

The Court: Of course it wouldn't have any weight. But the point is, he is not testifying to a fact. He is testifying as to his opinion.

Now, as to these witnesses who testified to facts as distinguished from opinions and then testified to their opinions, you had mixed testimony from witnesses who testified as to facts, where they testified as to their analyses of the particular tablet and then testified also as to opinion, in these other instances which you speak of, where they made simulated tests.

Mr. Elson: I think I ought to make an offer of proof, though, if I may.

The Court: Yes.

Mr. Elson: Where is that work sheet.

The Clerk: There it is.

Mr. Elson: I offer to prove at this point, by this witness, that on June 27, 1951, at my request, he prepared a work sheet for the manufacture of 7,000 tablets, each to contain 22 micrograms of estradiol; that the work sheet was prepared, listing upon it precisely the same ingredients, in the same amounts, as those shown on the work sheets which have already been introduced in evidence, namely, Exhibits B, [113] C, D, E, F, and G, that the

(Testimony of Joseph G. Galindo.)

tablets were not only made under his supervision, but they were made as well in conjunction with two other gentlemen in the laboratory and they were checked by them all the way through the process of manufacture; then another batch of tablets was made from the same work sheet, containing precisely the same ingredients as the first, as well as in these others, excepting that the estradiol was omitted; and that these two batches of tablets were sent over to a gentlemen whom I will call and qualify as an expert, and that he ran a U.S.P. assay on the batch alleged to contain 22 or 23 micrograms of estradiol, for the purpose of determining the amount of estradiol in it.

Mr. Klinger: Doesn't this go beyond the offer of proof with respect to this work sheet?

The Court: No, no. He is entitled to make a complete offer of proof, to show the materiality of his offer.

Mr. Elson: I am going on a little further. I just cannot stop in the middle of it.

The Court: If you stop in the middle of it, you would have to be overruled.

Mr. Elson: Yes.

The Court: But you have to go sufficiently far to show the materiality.

Mr. Elson (Continuing): That this gentleman also ran an assay on the batch of tablets which were alleged to contain no [114] estradiol, and he then put into those tablets 22 or 23 micrograms of estradiol and ran an assay according to the

(Testimony of Joseph G. Galindo.)

U.S.P. method; and in both cases he came up with certain results to which he will testify.

Now, that is my offer.

The Court: Do you have any objection?

Mr. Klinger: Your Honor, I offer the same objection, certainly at this stage of the proceeding, to the particular offer that is being made.

The Court: The objection is sustained.

Mr. Klinger: If the expert comes to testify, perhaps with some foundation thereafter for the basis of his opinion, it might be given.

The Court: Yes. Would it make a considerable difference if you stated what the finding was?

Mr. Elson: I will state it right now.

The finding was this, your Honor, and I include this in my offer of proof: that for the purposes of his test this expert took the standard, took the reference standard, as they call it, estradiol, which is to contain the same, that is, the melting point of a certain amount and the optical rotation of a certain amount, all of which was for the purpose of this, to establish that it came up to that potency. Then he took this first estradiol and he ran a U.S.P. assay on it to determine whether or not during the course of the [115] assay there was some estradiol lost by clinging to the glass, or in some other fashion, and that he came up with a finding that during the course of that assay with the first material he lost 27½ per cent of estradiol.

He then took the tablets that were alleged to contain 23 micrograms of estradiol, ran them

(Testimony of Joseph G. Galindo.)

through on a U.S.P. assay, and found that, when he did not correct for the amount of the known loss of 27½ per cent, he recovered only 10.1 of the supposed amount of 23 micrograms.

That when he corrected for the 27½ per cent, he came up with 13.8 micrograms; in other words, a loss there of about 40 per cent.

That when he took the placebo, or the blank tablet, and added 20 micrograms of estradiol, before making the correction for the known loss of 27½, then he came up with the same amount. In other words, all he could get was 10.1, and when he made the correction for the 27½ per cent known loss, he still came up with 13.8 micrograms, which meant that even in that case, where he had put in the known quantity of estradiol, he got something like 30 per cent of known loss.

Now, that is what this testimony is for, to lay the foundation for that testimony.

The Court: Do you have any objection, counsel?

Mr. Klinger: Your Honor, if it is only for a foundation for what this witness is going to testify to, as stated, we [116] will withdraw our objection to the offer at this time.

Mr. Elson: I can assure you that is the only purpose of it.

Mr. Klinger: With that limited purpose, we would have no objection.

The Court: Very well.

Q. (By Mr. Elson): Now, going back to June 27, 1951——

(Testimony of Joseph G. Galindo.)

The Court: The objection was withdrawn.

Q. (By Mr. Elson, Continuing): ——did you prepare a work sheet.

The Court: Just a moment.

The Clerk: The exhibit has not been offered.

The Court: The exhibit has not been offered.

Mr. Elson: No, it has not, and I think now it would be proper for me to offer it, inasmuch as I am going to use it. I now offer it as Defendants' Exhibit H.

Mr. Klinger: No objection on the grounds heretofore stated, your Honor.

The Clerk: Exhibit H in evidence.

(The document referred to was marked Defendants' Exhibit H and received in evidence.)

Q. (By Mr. Elson): Now, I hand you Exhibit H, Mr. Galindo, and ask you to open it. Did you prepare a batch of approximately 7,000 tablets?

A. That is correct. [117]

Q. Now, will you tell me, please, the difference between the contents of that tablet, at least so far as the work sheet goes, and what is contained on the work sheets that were made up in connection with the manufacture of the products that are involved in this litigation?

A. There is no difference. They are identical.

Q. In other words, they show the same amount of estradiol, the same amount of excipients——

A. That is correct.

Q. ——and the same kind of excipients?

(Testimony of Joseph G. Galindo.)

A. And the same type, that is correct.

Q. Where did you get the estradiol that you used in this?

A. This alpha-estradiol came from Silas & Co.

Q. What kind of estradio was it?

A. U.S.P. alpha-estradiol.

Q. Was the entire manufacturing process of this done under your supervision?

A. That is correct.

Q. By that I mean did you follow each step throughout the course of the entire manufacture until the finished product was obtained?

A. I did personally, that is correct.

Q. Did anyone else do so with you?

A. Yes, our director of laboratories, Mr. Atkins, and [118] our pharmacist, Mr. Vigario.

Q. And I mean by that, that you gentlemen went physically around to each step in the manufacture of this product, from the time it went in, in powdered or liquid form, until it came out as a tablet?

A. That is correct.

Q. And on the same day, using the same work sheet, did you make up a batch of the same tablets, with the same ingredients, in the same amounts, but with the estradiol left out?

A. That is correct.

Q. And was it manufactured in precisely the same way? A. In identical fashion, yes.

Q. And with the same gentlemen, including yourself, supervising it?

A. That is correct.

(Testimony of Joseph G. Galindo.)

Q. In the same manner?

A. In the same fashion.

Q. When were both of those batches completed?

A. Those batches were completed on June 27, 1951.

Q. Then, what did you do with the samples from each of those batches?

A. The samples of each of these batches were sent to Dr. Robert E. Hoyt, of the Cedars of Lebanon Hospital in Los Angeles.

Q. And that was the end of it so far as you were [119] concerned?

A. As far as I was concerned, that was the end of it.

Mr. Elson: I think that is all.

* * *

Cross-Examination

By Mr. Klinger:

Q. Mr. Galindo, how long have you been with Crest Laboratories?

A. Approximately six years.

Q. And when the tablets that are involved in this case were manufactured, that was when, in 1949? A. In 1949, that is correct.

Q. The Crest Laboratories at that time, did it employ 35 people as you have testified, or is that the present employment?

A. That is the present employment.

Q. And the six tablet machines and the one encapsulating machine, was that equipment——

(Testimony of Joseph G. Galindo.)

A. That is all as of the present.

Q. As a matter of fact, the Crest Laboratories was a considerably smaller establishment in 1949 than it is today, isn't that right?

A. Yes, that is correct. [120]

Q. As a matter of fact, how many people did it employ in 1949?

A. In 1949, a total of about 50 people.

Q. A total of how much?

A. Of about 50 people.

Q. And that isn't less than the 35 people presently employed?

A. The 35 people presently employed are in the manufacturing plant, the tablet plant itself.

Q. That is what I mean. In 1949, what was the situation then?

A. In 1949, I would say the personnel in the plant was in the neighborhood of 15.

Q. And at that time you were the production manager, is that correct? A. That is correct.

Q. And as production manager what precisely were your duties?

A. The supervision of all manufacturing processes.

Q. Well, you did not actually perform the manufacturing processes. A. No. That is correct.

Q. You were just responsible for them, is that it?

A. I was actually in the plant, I oversaw the manufacturing processes. I did not myself engage

(Testimony of Joseph G. Galindo.)

in the manufacturing [121] procedures. If I did, it was to a minor degree.

Q. So that, with respect to these work sheets that are here in evidence covering the tablets involved in this action, you did not actually handle the manufacture of those tablets yourself, did you?

A. I did not handle the materials myself, that is correct.

Q. When you spoke of your educational background, Mr. Galindo, did you say you had received a science degree from U.C.L.A. in 1940?

A. No, I did not.

Q. Did you receive any degree from U.C.L.A.?

A. No, I did not.

Q. You mean you did not complete your college education at U.C.L.A.? A. That is correct.

Q. You didn't receive a Bachelor of Science degree there and at U.S.C., which you attended for six months, you did not receive a degree there, did you? A. No, sir.

Q. Now, referring to these work sheets which I have here, when you testified that the work sheet that is Defendants' Exhibit H in evidence was identical with the other work sheets, you did not actually mean that it was identical in all respects, did you? [122]

A. Certainly not as to the amount.

Q. Yes. After all, Exhibit H refers to a 7,000-capsule batch, doesn't it, or 7,000 tablets?

A. Tablet batch, that is correct.

Q. Yes. A. That is correct.

(Testimony of Joseph G. Galindo.)

Q. Whereas, these others refer to much different quantities? A. Much larger quantities.

Q. Much larger quantities?

A. That is correct.

Q. In each case? A. That is correct.

Q. Would you say that it is easier to deal with larger quantities or smaller quantities of material of this kind, that there is more or less likehood of error, for example?

A. I don't think there is any difference so far as errors are concerned.

Q. You think it is just the same? A. Yes.

Q. No greater difficulty in dealing with a quantity involving 150,000 tablets than 7,000 tablets?

A. No, sir.

Q. Now, these work sheets, I take it, show everything that was done during the manufacturing process of these [123] tablets, is that correct?

A. It shows the ingredients.

Q. Doesn't it show the processing? I see "Weight after granulating," "Weight before tableting." Doesn't it show all the steps that were taken?

A. It shows the figures at these different steps.

Q. Yes. Now, I notice on the work sheet which is Defendants' Exhibit H there is a place on the work sheet, "Laboratory analysis released by" and so on, that is blank. A. That is right.

Q. No laboratory analysis was made by Crest Laboratories of these tablets, is that right?

A. That is correct.

Q. And the same thing, I take it, is true with

(Testimony of Joseph G. Galindo.)

respect to these other work sheets? In other words, it is true also, is it not, that no laboratory assay or analysis was made by Crest Laboratories of any of these tablets (indicating on document)?

A. That is correct.

Q. Now, let us take one at random, Defendants' Exhibit B, that is work sheet number 2571, is that one that related to the 22 micrograms?

A. Yes, that is the 22 micrograms.

Q. All right. We will take that one, for example. I notice here on the work sheet, "Weight after granulating, [124] 103 pounds 12 ounces."

A. That is correct.

Q. "Weight before tableting, 103 pounds 12 ounces." A. That is right.

Q. "Weight after tableting, 103 pounds 8 ounces." A. That is correct.

Q. A loss of 4 ounces.

A. That is true.

Q. Take Defendants' Exhibit D, work sheet number 3180, "Weight after granulating, 103 pounds 12 ounces." A. That is right.

Q. "Weight before tableting, 103 pounds 12 ounces." A. That is correct.

Q. "Weight after tableting, 102 pounds 4 ounces," is that right? A. That is correct.

Q. Although that doesn't have any initial after it, does it? A. No. It does not.

Q. So, you don't know who weighed it, you couldn't tell from the sheet who weighed it?

A. There are no initials there.

(Testimony of Joseph G. Galindo.)

Q. Yes. So that you don't know?

A. That is correct.

Q. A loss of 1 pound 8 ounces, is that [125] correct? A. That is correct.

Q. Not having made any analysis, you don't know whether the estradiol was lost in the course of the manufacturing process, do you?

A. No, sir.

Q. Something was lost, wasn't there?

A. Yes.

Q. And in each case where we have these weights, that was presumably made by the persons whose initials appear, is that right?

A. That is correct.

Q. And for example, as I have indicated on 3180, there are no initials for the weight after tableting. A. That is right.

Q. For those tablets, are there?

A. That is right.

Q. On Defendants' Exhibit B, batch 2571, or on sheet 2571, there are no initials for the weight before tableting. A. That is correct.

Q. On 3181, which is Defendants' Exhibit G, there are no initials for weight before tableting.

A. That is correct.

Q. In fact, there is no weight given for weight after ganulating. [126] A. That is right.

Q. So that you mean it was not weighed at all?

A. It was weighed. This weight is the weight that appears here. The weight after granulating is checked as it comes out of the drying houses. The

(Testimony of Joseph G. Galindo.)

weight before tableting is merely this weight that is received from the drying houses into the tableting department.

Q. And these other sheets do have weights after granulating? A. That is true.

Q. But this one does not?

A. That is right.

Q. Nor does Defendants' Exhibit E, is that correct? A. That is correct.

Q. On work sheet 2803, Defendants' Exhibit F, there are no initials given for the weight after granulating, the weight before tableting, or the weight after tableting, are there?

A. That is right.

Q. And similarly, on 2800, Defendants' Exhibit C, there are no initials given as to who weighed the tablets or the mixture after granulating, before tableting or after tableting?

A. You have an inital here (indicating on said exhibit), "P. L.," which is Paul Lauerman, and that shows the weight of the individual. [127]

Q. You do not mean the weight of the individual, do you?

A. The materials were weighed by him.

Q. It means who weighed these materials?

A. That is right, but there are no initials here (indicating on said exhibit), that is right.

Q. It doesn't mean he made the weighing at those places? A. That is correct.

Q. Because on some of these others where you have materials weighed by G. K., you got initials

(Testimony of Joseph G. Galindo.)

showing that P. L. did the weighing before tableting—this is Defendants' Exhibit E—and that somebody, T. B., did the weighing after tableting.

A. Yes, that is correct.

Q. And these are the control sheets that show every step of the manufacturing process at Crest Laboratories, at the time these tablets were manufactured, is that right? A. That is correct.

Q. On the batch of 7,000 that were made up for this special experiment at Mr. Elson's request, that is, at counsel's request, that is who asked you to make up this batch, is that correct?

A. That is correct.

Q. And this was made under your supervision all the way down the line?

A. That is correct. [128]

Q. There is no weight shown after tableting, although we have noticed on some of these others that there is a loss of weight after tableting.

A. That is true. That is manufacturing loss.

Q. Yes, I understand, but it doesn't appear here that there was any weight ever made after tableting.

A. These tablets were not to be sold. They were not to be invoiced, and why there is no weight after tableting, I cannot explain that. However, it was merely a run of 7,000 tablets for a special request.

Q. But this was the one batch which, according to your testimony, was made directly under your supervision, and I think you said, in conjunction with two other members of your staff, you followed

(Testimony of Joseph G. Galindo.)

the process through exactly to make sure that the tablet in every respect conformed or was supposed to conform to the tablets that are involved in this proceeding. A. That is right.

Q. And yet they were not weighed after tableting. A. That is true.

Q. Then, how many of these tablets did you send to Dr. Hoyt?

A. There were approximately 500 tablets.

Q. You mean of the 7,000?

A. That is correct.

Q. 500 were sent to Dr. Hoyt? [129]

A. That is correct.

Q. And were those 500 all the same?

A. They came out of the same 7,000.

Q. Was it to any of that group of 500 that you added the alpha-estradiol that has been testified about?

A. May I say this: 7,000 tablets were prepared with the alpha-estradiol, as is noted in that particular work sheet just in question at the moment. And an additional 7,000 was prepared without the alpha-estradiol.

Q. Then, you are talking about Defendants' Exhibit H when you refer to this particular work sheet? A. Yes.

Q. Go ahead. I am sorry.

A. 500 of each of those were sent to Dr. Hoyt.

Q. Let me hear that answer again. I did not get it.

A. Approximately 500 tablets of each of these.

(Testimony of Joseph G. Galindo.)

Q. Of each of what?

A. I just mentioned that we made 7,000 alpha-estradiol tablets.

Q. 7,000 containing alpha-estradiol?

A. As indicated in that particular work sheet.

Q. Yes.

A. There were another 7,000 tablets made with no alpha-estradiol.

Q. Where is the work sheet on that? [130]

A. The same work sheet was followed, but the alpha-estradiol was eliminated.

Q. You mean this work sheet represents 14,000 tablets, actually, 7,000 with alpha-estradiol and 7,000 with only excipients?

A. That is correct.

Q. With no alpha-estradiol?

A. That is correct.

Q. So, when it says "Batch size 7,000," "No. of batches 1," that should be actually in this case "No. of batches 2," one of alpha-estradiol and one without?

A. Perhaps. Request was made for approximately 7,000 alpha-estradiol tablets.

Q. Why do you say "approximately"?

A. Let me finish.

Q. All right.

A. The request was made for approximately 7,000 alpha-estradiol tablets. We went ahead and made 7,000 tablets. Then, an additional request was made for 7,000 tablets, with all the constituents of the first 7,000 tablets without the alpha-estradiol.

(Testimony of Joseph G. Galindo.)

The same work sheet was used, but the alpha-estradiol was eliminated.

Q. Then, the same procedure was followed with respect to each of the two batches of 7,000 each?

A. That is correct. [131]

Q. So, if the first batch was not weighed after tableting, the second batch was not weighed after tableting? A. That is very likely, yes.

Q. Well, that is what the work sheet shows.

A. Well, the possibility exists that they may have been weighed and a record not made.

Q. You mean that it is possible that things were done with those products which do not appear on this work sheet?

A. I mean that that work sheet is more or less considered in our laboratory as not an order, certainly, it is a request, not invoiced, more or less put through as an experimental project.

Q. So that there was less care taken with it? I thought that your testimony on direct was that there was more care taken with this, that there were three of you personally supervising this operation.

A. There was more care—now, may I point this out: The materials were weighed and certainly checked by three individual people, the process was followed by three individual people, every step was followed through. The weight of the tablets, the weights of the individual tablets were checked by the people concerned. The fact that the total batch weight is missing does not mean that less care was

(Testimony of Joseph G. Galindo.)

taken. There is a manufacturing loss in any operation.

Q. Isn't it important to know what the manufacturing [132] loss is?

A. From the standpoint of cost, certainly.

Q. But on what the loss is, isn't that equally important?

A. When the material goes to the tableting department, you have a uniform homogenous mass. That is, if a tablet is going to weigh, for purposes of an example, 7 grains, every 7 grains of that material that goes into the tableting machines has the 22 micrograms of alpha-estradiol. If you lost one-half of that material, if the batch weight represents 10 pounds and you lose 5 pounds of that material, that does not mean, by any stretch of the imagination, that you have lost one-half of its potency, because the potency is an inherent property by that time of the batch or the bulk that is going to make tablets.

You can have a 90 per cent loss, but of the 10 per cent that you do tablet, each one of those tablets has your alpha-estradiol in there. A manufacturing loss does not represent a loss in potency.

Q. But you don't know that for a fact? According to your testimony, you did not assay this material to determine whether more alpha-estradiol was lost in the manufacturing process than the proportionate amount of material that was lost?

A. That is quite true. And the fact is—— [133]

Q. You don't know?

(Testimony of Joseph G. Galindo.)

Mr. Elson: Let him finish.

Mr. Klinger: I am sorry. I did not mean to interrupt.

The Witness: We know, we have established by the checks—and the lot numbers of the material were kept track of—that the alpha-estradiol was used. As I remember, on one of those work sheets there was a pound four ounces of material lost, and I said that represented a manufacturing loss. Certainly that would not be alpha-estradiol, would it? You don't have that much alpha-estradiol in it. You have it in the order of a few grams.

Now, you certainly have a point, as you say, all right. By the way, the loss there was after it was tableted, was it not?

Q. Well, they are your work sheets?

A. Well, you pointed the loss out to me, however.

Q. It seems to me that there is a loss at each step. I mean, isn't there some loss at the granulation and some loss at the tableting?

A. Generally a loss occurs at the tableting.

Q. All right.

A. There are losses at other points. One of the reasons for having overages in all pharmaceutical tablets is to prevent loss in manufacture, and so forth.

Q. The point I want to make clear is, at the time you [134] manufactured these tablets involved in this proceeding and sent them to the Woodard Laboratory, you made no analysis or assay of those

(Testimony of Joseph G. Galindo.)

tablets to determine whether they did have the labeled or declared potency as to each tablet?

A. That is true, the reason for that being that, at that time, we have no reliable method of assay, there was no U. S. P. method of assay for alpha-estradiol tablets. There were some assays proposed, but those were for pure materials, not for materials containing alpha-estradiol such as these tablets. As we know in our laboratories today, these materials interfere, so, as far as to the best of our knowledge, there was no assay for alpha-estradiol tablets.

Q. You mean so far as you knew, there was none? A. That is correct.

Q. What effort did you make to determine what methods were available for analysis or for assaying?

A. Well, the literature that we subscribe to, certainly—we subscribe to 25 or 30 different journals.

* * *

Mr. Klinger: Mark this for identification, please.

The Clerk: Plaintiff's Exhibit No. 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Klinger): I show you Plaintiff's Exhibit [135] No. 3 for identification. As recited on there, it purports to be a reprint from the Journal of American Pharmaceutical Association, Scientific Edition, Volume XXXVI, No. 7, for July, 1947. Is that one of the journals?

(Testimony of Joseph G. Galindo.)

A. We subscribe to that journal, that is correct.

Q. And are you familiar with that monograph or publication?

A. Yes. I have seen the monograph and I have read the assay. I cannot discuss the assay. I am not familiar with that. However, I am familiar with the method here shown.

The Court: Keep your voice up.

Mr. Elson: I can't hear you.

The Court: I can't hear you.

The Witness: I say that I am familiar with the method here shown me, the Carol and Molitor method of the determination of alpha- and beta-estradiol.

We subscribe to this journal that this gentleman just shows me.

Q. (By Mr. Klinger): It is entitled "A Modified Kober Method for the Determination of Alpha- and Beta-estradiol," is it not?

A. That is correct.

Mr. Klinger: I will offer that at this time, your Honor. I don't think there is going to be any objection.

Mr. Elson: Yes. There is no question about that being a [136] modified Kober method, but at the same time I object to it because it is immaterial and irrelevant so far as this case is concerned. Upon its face it has to do with the assay of estradiol, not with the assay of a tablet with excipients and estradiol, which are two different things.

(Testimony of Joseph G. Galindo.)

Mr. Klinger: The extraction process has been testified to heretofore.

Mr. Elson: There is nothing in there about an extraction process, Mr. Klinger.

Mr. Klinger: No, but this is for the assay after the extraction process. This witness has testified that there were no methods so far as he knew for the analysis of alpha-estradiol——

The Court: Can you agree on what it is? Let me see it.

Mr. Elson: We have here a tablet, not just pure estradiol.

The Court: The objection will be sustained for the moment, and later on, if you put an expert on, we will find out what it is.

Mr. Klinger: Yes. I will leave it here now.

Q. Speaking of methods of extraction of alpha-estradiol, were you aware in 1949 or did you have any knowledge of any methods of extraction of drugs that would be applicable to the extraction of alpha-estradiol tablets of this kind?

A. Yes, certainly, in the course of my education I ran [137] across some of them.

Q. Will you speak a little louder, please?

A. I say, during the course of my education I ran across some of the methods used in the extraction of drugs and other materials.

Q. Well, from your experience, would you say that any of these extractive methods would be applicable to the extraction of alpha-estradiol tablets?

Mr. Elson: Just a moment. Your Honor, I am

(Testimony of Joseph G. Galindo.)

going to object to that question and to a line of questioning like this. This witness has not qualified himself, or not even qualified himself as an expert in the assaying of estradiol tablets. That is going to come from other witnesses. This gentleman here is the gentleman who supervised production, not the assaying of raw material or the finished product.

The Court: Objection overruled.

(Pending question read by the reporter.)

A. No.

Q. (By Mr. Klinger): You don't know of any?

A. I don't know—I did not know of any methods suitable for the extraction of alpha-estradiol.

Q. Are you still making alpha-estradiol tablets at Crest Laboratories? A. Yes, we are.

Q. And do you now assay them before shipping them to [138] the purchaser? A. Yes, we do.

Q. And what method of assay do you use?

A. I myself would rather not answer that question because—let me put it this way——

The Court: If you don't know, just say so.

Q. (By Mr. Klinger): Do you know?

The Court: Is it your own?

The Witness: It is our own assay that we developed. We have had to develop our own assay.

Q. (By Mr. Klinger): You do not use the U.S.P. XIV assay?

A. We do not use the U.S.P. XIV assay.

Q. Are you unable to tell us the method of assay that is used? A. Yes.

(Testimony of Joseph G. Galindo.)

Q. Do you mean you are not qualified to do that? A. I am not qualified to do that.

Mr. Klinger: All right. No further questions.

* * *

Redirect Examination

By Mr. Elson:

Q. Mr. Klinger has asked you a lot of questions here having to do with some loss after tableting. Now, can you take us from the commencement of your manufacturing process [139] and explain how a loss can or does occur in a manufacturing process and what the loss consists of?

A. Would you like me to follow the manufacturing process involved in the manufacture of tablets and these, too, and perhaps point out where the loss might occur?

Q. I wish you would do that, and I wish, at the time that you are doing that, you would explain, as nearly as one might do without going into too much detail, the nature of the equipment that is used.

A. Yes, certainly. I think I can do that.

Q. Like your mixing machine and all that sort of business.

A. All right. The process consists of the following: The weighing of the individual ingredients——

Q. Now, let us start with that. You have a room where these ingredients are, do you?

A. That is right. That is called our weighing room.

(Testimony of Joseph G. Galindo.)

Q. Now, then, we will say you are going to make some estradiol tablets, and someone comes up to the weighing room and says they want some material; is that it?

A. Well, the work sheet will be in the weighing room for the weighmaster to weigh. He will weigh the quantities indicated in the work sheet. They are weighed individually into individual packages.

They are then transferred to the mixing department, where [140] they are mixed, and there again in a standard pharmaceutical equipment.

Q. You say "standard pharmaceutical equipment." What is your mixing machine like—like a cement mixer, for instance, isn't it?

A. Well, or a dough mixer, a bread-dough mixer, something like that, very closely. It is of stainless steel.

Q. What does he put in the mixer?

A. He puts all of his ingredients into the mixer.

Q. Including the estradiol?

A. Including the estradiol, in solution. A solution is made of the alpha-estradiol, added to the mix, to achieve distribution.

Q. Then, being very academic, what you have is like a dough mixer in a bakery shop; you have all the dry material, and the estradiol in solution is poured into this mix? A. That is correct.

Q. And it is just a conglomerate mass there?

A. That is right.

Q. And then what happens?

A. Then the material is withdrawn. Once the

(Testimony of Joseph G. Galindo.)

mass has been wet, the mass is withdrawn and put through what we call a granulator.

Q. Before it is withdrawn, it is mixed up in the mixer, is it not? [141]

A. I thought we had gone through that. Yes, certainly.

Q. Yes.

A. It is withdrawn and put through a wet granulator, that is a machine that produces an extrusion resembling macaroni. This is put on trays that are lined with paper and then introduced into a drying house, a drying oven, where it is dried for a certain length of time.

It is then withdrawn and ground through a Stokes oscillator. This machine forces the granules or the extrusions through a screen, to produce the granulation of a definite mesh.

It is again introduced into a mixer of the type just described and mixed. Then, additional materials, what are termed the lubricants, are added and well mixed, withdrawn, and then put onto the tablet presses.

The tablet presses are a rotary-type machine comprising a turntable in which there are dies and punches.

The material falls into the cavity of the die. The two punches are made to come into the die, entrapping the material between the two punches, and pressure is applied to them. And this pressure alone forms the tablet.

(Testimony of Joseph G. Galindo.)

Q. All right. Now, then, what is the purpose of weighing after tableting?

A. To determine our manufacturing loss.

Q. In other words, number of tablets [142] shown? A. That is right.

Q. From your work sheet you determine that each tablet will weigh so much, is that correct?

Well, how do you use the weight after tableting to determine the manufacturing loss of tablets?

A. The number of tablets is determined from the weight produced after tableting. We know the weight of one tablet.

Q. Where do you know that from?

A. Well, we know that during the time of manufacture, during the time of compression a sample is withdrawn at intervals of 15 to 20 minutes, and a cumulative sample is collected. In that manner, once the run is completed, the compression run, the tableting run, that sample is sent to the laboratory for a physical check. I am talking about these tablets in question, now. The tablets were sent to the laboratory. It was ascertained that they were the right size, the right weight, and the weight was determined from the sample collected. So, if we know what the weight after tableting is of the entire batch, we can determine how many tablets we ended up with.

Q. You don't actually count the tablets at the end? A. No.

Q. You determine it by weighing them?

A. From the weight, that is correct.

(Testimony of Joseph G. Galindo.)

Q. All right. Now, then, on this matter of a loss of [143] material during the manufacturing process, what is the nature of the loss; what is lost?

A. All right. Now, during the tableting process, is that correct?

Q. Yes, or during the manufacturing process from beginning to end.

A. Well, you have loss of mixed materials.

Q. How do you mean? A. Of the batch.

Q. Explain that.

A. Pardon me. I don't understand your question.

Q. Well, now, Mr. Klinger was asking you about a loss of four ounces. I know on one question he asked you, he pointed out that there was a loss of four ounces after tableting. Do you remember that? A. Yes.

Q. What did that mean?

A. That means that four ounces of the entire batch, that is, of all the ingredients together of a homogenous mass or mix, has been lost.

Q. Lost where and how?

A. Lost to dust in the air, I mean blown off as dust.

Q. It is blown off, you mean, as dust?

A. Blown off. There is loss from the punches, itself, or from the dies, itself, in the tableting machine. That is [144] the nature of the loss.

Q. All right. Now, is it standard pharmaceutical—is that something that always occurs in manufacturing processes? A. Absolutely.

(Testimony of Joseph G. Galindo.)

Q. In other words, we have a mixing machine here which is like a cement mixer on a small scale, or like in a baker's kitchen, there is a certain amount, is there, of the homogenous mass that sticks to the side of it?

A. Yes, but the loss does not occur there, because that is all collected.

Q. I see. Just where is the loss, then?

A. Your measurable loss is in your tableting operation.

Q. Meaning what? Where does it occur?

A. In the tableting machines.

Q. You mean it sticks in the machine?

A. It is lost to the air, it is lost from the dies.

Q. I see. Now, in the tableting machine. Is that the machine that goes around rapidly, or what does it do?

A. That is the rotary tablet press, yes. It rotates rapidly, producing these compressed tablets.

Q. Now, in your plant and in any other that you have seen, conducting similar operations, where tableting operations are going on, is it a common thing for dust to be found around a good portion of the premises?

A. Yes. Dust from the material—— [145]

Q. That is what I mean.

A. ——that is being compressed. That is true.

Q. A wet dust?

A. That is right. It will be dust on the machine itself. You see, in feeding this material into the rotary tablet press, it must be guided into the dies,

(Testimony of Joseph G. Galindo.)

into the cavity of the die. This guide is called a feed frame. The table, the rotary table that contains the punches in which the tablets are made, rotates under this feed frame. That space between the feed frame and the rotary table allows or produces a certain loss. I mean it can't be jammed down onto the rotary table. There is a clearance of a few thousandths of an inch. Well, that creates a loss. Being that this material is in this feed frame as the rotary table moves, some of that material is lost between those two pieces.

Q. In connection with these products that are the subjects of this lawsuit, what was the purpose of putting in a 5 per cent overage of alpha-estradiol? A. Merely to insure potency.

Q. In your experience, has it happened that material has been lost by a machine turning over or a bag of material being dropped, or something of that sort?

A. Well, offhand I can't recall of such an instance. If that should happen, of course, if the bag is dropped, or if a machine or a mixing machine is turned over, the material [146] is dirty, certainly, and no longer suitable for use, and so that is rejected. Loss in that way is far-fetched.

Q. Do you recall any instance of it happening?

A. No, I do not.

Mr. Elson: That is all.

(Testimony of Joseph G. Galindo.)

Recross-Examination

By Mr. Klinger:

Q. Now, if I understand the process correctly, Mr. Galindo, the granulating comes before the tableting? A. That is correct.

Q. And was it your testimony as to this manufacturing loss that there always is a manufacturing loss in the tableting process? A. That is true.

Q. I show you Defendants' Exhibit G, for example. We find that with respect to these tablets, the weight before tableting and the weight after tableting is given as 7 pounds 2 ounces for both, at both periods? A. That is true.

Q. So that there was no loss?

A. So that there was no loss.

Mr. Elson: What are you talking about, Mr. Klinger, what exhibit?

Mr. Klinger: This is Defendants' Exhibit G.

Mr. Elson: That has to do with 110-microgram tablet [147] that isn't involved here.

Mr. Klinger: I know, but it is in evidence and goes to the manufacturing process and to the testimony of this witness.

Q. And I will show you Defendants' Exhibit F, work sheet number 2803, the weight before tableting and the weight after tableting being given as 14 pounds and 4 ounces in both instances, is it not?

A. That is correct.

Q. So that there is no loss in weight in the tableting step? A. That is true.

(Testimony of Joseph G. Galindo.)

Q. According to your own records?

A. That is true.

Q. Now, the weight after granulating on this same exhibit which, as I understand your testimony, comes before the tableting——

A. That is correct.

Q. ——is given as 13 pounds, right, on this exhibit? A. That is correct.

Q. How does it increase in weight between the granulating and the tableting?

A. That I cannot explain to you. The only thing that I can surmise is that this is an error.

Q. Now, actually, the alpha-estradiol that is used to make a batch of these tablets is very small in terms of ounces [148] or weight, is it not?

A. That is correct.

Q. Would you say that, for example, the alpha-estradiol that is used in the batch of 110,000 tablets weighs about one-thirtieth of an ounce?

A. I would say it was a ninth to a tenth of an ounce.

Q. A ninth to a tenth of an ounce?

A. Yes.

Q. And there would be no way of knowing, would there, whether in the manufacturing process where something is blown off, as you say, or where these clearances are that you are discussing in the feed frames, or in the weighing process somewhere, one-ninth of an ounce could be lost?

A. Yes, one-ninth of an ounce of what can be lost?

(Testimony of Joseph G. Galindo.)

Q. Of alpha-estradiol, one-ninth of an ounce of the substance, and if you are mixing, if it is after the mixing—— A. Perhaps—I am sorry.

Q. Let me first finish it. Let me ask you this:

It is possible, is it not, that the part that disappears could be all or a large part of the alpha-estradiol? A. No.

Q. You say it is not possible? A. No, sir.

Q. And why do you say that?

A. Simply because of this: You see, the alpha-estradiol [149] has been made—if you want to think of it this way, and perhaps I can use an example later on, or an illustration—the alpha-estradiol, by being dissolved in solution, being added to the excipients as shown in these work sheets, has become an integral part of that granulation.

Q. Are you finished? I mean, is that the reason you give?

A. So, during the tableting operation or in any of these operations after being granulated or being wet, if any of that material is lost, I cannot conceive, and I don't think it is reasonable to conceive, that it is only the alpha-estradiol that is being lost.

Q. But if you make no test of the homogeneity of the mass, how are you certain that the mass is homogeneous? A. The entire mass is wet.

Q. But could it not be that the alpha-estradiol has not been thoroughly mixed into the mass?

A. The alpha-estradiol is part of the wetting material.

(Testimony of Joseph G. Galindo.)

Q. That is put in?

A. That is right. So, if the entire mass is wet, you must assume that the homogeneity is achieved.

Q. By eyesight, is that your testimony, so that it is an integral part of this homogeneous mass, is your assumption as to what the situation is, but not based upon any test or sample that is taken from that mass and tested for uniformity, [150] for example, or for the presence of alpha-estradiol throughout the mass, is that correct?

A. Well, I think that is certainly something that is observable. If the alpha-estradiol is dissolved and the entire mass wet with this solution, and the entire mass is wet, that is, it is no longer a powder, it is a wet mass, certainly there must be homogeneity.

Q. I take it, though, that that is based on what you told us of your observation of the mass and not on any assay or analysis of the mass that is made at that time.

A. All right. That is different, yes.

Q. Is that correct? A. That is correct.

Mr. Klinger: No further questions. [151]

* * *

DON CARLOS ATKINS

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Elson:

Q. Mr. Atkins, by whom are you employed?

A. I am employed by Crest Laboratories.

Q. And in what capacity?

A. I am a director of laboratories.

Q. And when were you employed there?

A. I came with the company in July, 1950.

Q. And where did you receive your education?

A. I received my bachelor's and master's degrees from U.C.L.A., and I have been working on my doctorate at U.S.C.

Q. Did you attend a course at the University of Southern California?

A. Yes. I have been working on my doctorate at U.S.C., [152] University of Southern California.

Q. And what societies are you a member of?

A. I am a member of the American Chemical Society, the Sigma Phi and Phi Lambda Epsilon Societies, and the Academy for the Advancement of Sciences.

Q. Did you receive some scholarship in connection with the American Chemical?

A. I received the Morrison, all-Navy Scholarship, for my undergraduate work at U.C.L.A.

Q. Prior to coming with Crest Laboratories, what was your employment?

(Testimony of Don Carlos Atkins.)

A. Immediately prior to coming with Crest, I was at the University of Southern California, working on my doctorate.

Q. Have you examined the work sheets in this case, Exhibits B, C, and D—I think they are the ones—having to do with 22 micrograms? Would you check me and see?

A. Yes. I have examined them.

Q. They are the work sheets having to do with a 22-microgram product, are they?

A. Yes. That is correct.

Q. Now, examining Exhibit B, tell me, if you can, the ratio of the amount of estradiol per tablet to the amount of excipients in the same tablet.

A. It is approximately 22 parts to 324,000.

Q. Twenty-two parts of what? [153]

A. Of estradiol to 324,000 parts of excipients.

Q. Now, you have examined the U.S.P. XIV assay method? A. I have.

Q. Now, in connection with the excipients which are contained in these tablets here, are there any of those excipients which, in your opinion, would have any interfering effect or could have any interfering effect on spectrophotometric or colorimetric readings?

Mr. Klinger: I do object to this. I don't think this witness has yet qualified himself as an expert in connection with alpha-estradiol or estrogenic substances.

The Court: Objection sustained. You better lay a better foundation.

(Testimony of Don Carlos Atkins.)

Q. (By Mr. Elson): Mr. Atkins, what work have you done at the Crest Laboratories in connection with the assay of estradiol?

A. In connection with the assay of estradiol, we have run a number of tests, using various published methods for the analysis of alpha-estradiol. We have examined these assay procedures and evaluated them according to our opinion. Included in these opinions is the U.S.P. procedure.

Q. U.S.P. XIV?

A. U.S.P. XIV procedure.

Q. Incidentally, do you know when the U.S.P. XIV method became official? [154]

A. I don't recall the exact date.

Q. What other method, besides the U.S.P., have you attempted in the assay of alpha-estradiol tablets?

A. We attempted the assay of alpha-estradiol using the method published by Groves and Huston, and that was published, I believe, in the Journal of American Pharmaceutical Society, but I would have to check that reference.

Q. Any other methods you have used?

A. Yes. There was one by Cohn and Bates, and I would have to check the exact reference on that.

Q. Approximately how many assays have you conducted of estradiol tablets?

A. Approximately 100 assays.

Q. Coming to the U.S.P. method, and keeping in mind the excipients present in these tablets here, can you tell me, in your opinion, what excipients

(Testimony of Don Carlos Atkins.)

there could interfere with a spectrophotometric or colorimetric reading?

Mr. Klinger: I still object. I don't think, on the base of 100 tests conducted fundamentally of the estrogenic substances, that this witness is qualified to testify as to what excipients would interfere with the extraction or analysis of estradiol.

The Court: It goes to the weight, counsel. Objection overruled.

Q. (By Mr. Elson): How many times have you used the [155] colorimeter for the purpose of reading in a case or having to do with an assay?

A. Well, over a thousand times.

Q. Now, then, answer my question; do you remember it?

A. Regarding which material which would interfere with the reading?

Q. That is right.

A. Let us say that mineral oil would certainly interfere with the spectrophotometric readings. Other interfering materials would be starch, Sterotex, and possibly sugar.

Q. And those materials are present in the excipients in this product here? A. They are.

Q. Tell me exactly how they would interfere.

A. They could interfere in several ways. In the first case, the mineral oil could interfere by interfering with the light readings, using the spectrophotometer.

The other materials could interfere by reacting with the sulfuric acid used in the assay procedure.

(Testimony of Don Carlos Atkins.)

Q. Now, you heard the government witness this morning state the list of excipients that they made up in this simulated product for the experiment that they conducted, did you? A. I did.

Q. Refreshing your memory, or do you remember——

A. Will you refresh my memory? [156]

Q. Cornstarch, sugar, mineral oil, and magnesium stearate. Now, what are the excipients present in the tablets that are involved here?

A. There are Sterotex——

Q. What is that?

A. Sterotex is a hydrogenate of cottonseed oil.

Q. All right.

A. (Continuing): And Sterotex, starch, Acacia, mineral oil, and powdered sugar and talcum.

Q. In other words, there is no magnesium stearate involved in these products?

A. No. There is not.

Q. What would magnesium stearate be used as a substitute for in making up the excipients?

A. Very probably for the Sterotex.

Q. Now, let us assume that you used magnesium stearate instead of Sterotex, would that have anything to do with the facility or the interference, in your opinion, with the conduct of a U.S.P. XIV assay? A. Yes, I believe it would.

Q. In what way?

A. In my opinion, the magnesium stearate would be soluble to a greater extent than would be the Sterotex.

(Testimony of Don Carlos Atkins.)

Q. Soluble what?

A. In the extracting material. [157]

Q. And what is that?

A. It would be ether—or, in the U.S.P. procedure, it would be choloroform, and in some of the other procedures it would be ether. And the degree of solubility would interfere, would affect the instrumental reading one obtains. If the material is present, it would interfere with the reading.

Q. Now, let us get down to this extraction business. As I understand it, there are two steps in the U.S.P. XIV procedure. One is the extraction of the estradiol from the excipients in the tablet, and the other is the reading of the amount of what you have extracted, by use of a colorimeter or some other machine such as that, am I right?

A. That is basically correct.

Q. Am I corect, then, in understanding that in order to have a correct reading at the end of the assay, you must extract the estradiol in the initial stages? A. That is correct.

Q. Now, is the U.S.P. method a long or a short method of assaying?

A. In my opinion, the U.S.P. method is a long method of assay.

Q. Long in what way?

A. Long in the number of steps which you have to go through before you can obtain any idea of how much estradiol is present in the tablets. [158]

Q. What are those steps calculated to do, or what is their function?

(Testimony of Don Carlos Atkins.)

A. The first steps are to remove the estradiol from the tablets, in extraction procedure, and the other steps involve the development of the color which is read in the instrument.

Q. I think you said that magnesium stearate was soluble in chloroform.

A. I believe it is.

Q. And Sterotex is not?

A. It is, to a lesser degree.

Q. And I understand you use chloroform in your U.S.P. procedure.

A. That is standard procedure.

Q. Now, let us suppose you use magnesium stearate instead of Sterotex, what effect would that have upon the extraction process that you are undergoing, what would that have to do with it, using that instead of Sterotex?

A. You mean you would be extracting essentially different materials?

Q. Well, you are extracting or you are attempting to extract the estradiol from the excipients, are you not? A. That is correct.

Q. And do I understand you to say that magnesium stearate being soluble in chloroform, you would extract magnesium stearate along with estradiol? [159]

A. Yes, you would. That is correct.

Q. Now, then, after you have extracted it along with the estradiol, what happens to the magnesium stearate? A. It remains in that extraction.

Q. And what effect would that have upon the

(Testimony of Don Carlos Atkins.)

final result of your assay, when you come to reading the color or the fluorescence?

A. It is my opinion that it would interfere with that reading.

Q. In what way?

A. It would probably give a higher reading. It would depend upon the absorption of light by magnesium stearate.

Q. The Sterotex isn't soluble in chloroform?

A. I don't believe it is as soluble as magnesium stearate.

Q. Therefore, not as much of it, I take it, would be pulled out of the mass with the estradiol, as would be in the other case?

A. I am not prepared to state that.

Q. Have you examined the modified Kober method of assay which we have here as Exhibit No. 3 for identification? And, for your information, that is the same one that I have shown you previously. A. Yes, sir, I have.

Q. Now, having examined that, in your opinion would [160] that method of assay, as set forth there, give you the information necessary to conduct an assay of a tablet such as we have here?

A. It would not.

Q. Why?

A. It does not provide for an extraction procedure.

Q. What does it provide for?

A. The analysis of estradiol itself.

Q. In other words, the pure estradiol?

(Testimony of Don Carlos Atkins.)

A. That is correct.

Q. Analysis for what, Mr. Atkins? I mean, if you have just estradiol, what would you analyze it for? I mean for what?

A. Well, there may be more than one material present, and if you want to see how much estradiol you have, the alpha-estradiol method is designed, as I understand it, to tell you that.

Q. In other words, you might have a material that is in liquid form and it purports to be estradiol, but you want to run the assay to be sure whether it is estradiol, and, if so, how much?

A. That is correct.

Q. All right. But the method itself would be of no assistance in assaying a tablet with excipients and estradiol?

A. Inasmuch as it does not provide an [161] extraction procedure, no.

Q. Do you consider that the extraction procedure, when you have a tablet, is absolutely necessary in order to conduct any assay of it?

A. It is my opinion that the extraction procedure is one of the prime steps in the assay of estradiol.

Q. Why do you say that the extraction procedure is of such importance?

A. Because if you do not extract it, you cannot measure it.

Q. You mean extract it from the excipients?

A. From the excipients.

Q. What is the purpose of the excipients in a tablet such as this, if you know?

(Testimony of Don Carlos Atkins.)

A. The purpose of the excipients is to give the tablet the desired weight, shape, and form and to permit the active ingredient to be delivered in suitable form for pharmaceutical manufacturing.

Q. In other words, so that a person could take estradiol, so they could take it, is that it?

A. That is right.

Q. It would be very difficult, I imagine, to take it in its raw form or pure form?

A. It would be difficult. [162]

* * *

Q. Mr. Atkins, are you aware of any method of assay for estradiol tablets that appeared in scientific literature prior to the time that the U.S.P. method became official, which was November 1, 1950? I am speaking about the tablets alone, not the estradiol.

A. I am aware of no method which was designed for the analysis of the tablets, analysis for estradiol content, prior to that date.

Q. You are familiar with the so-called modified Kober method? A. Yes, sir.

Q. And does that method provide for the assay of estradiol tablets or estradiol?

A. Estradiol. [165]

Q. Now, in the assay of a tablet such as this, that is, a tablet, does the presence of excipients have any bearing upon the assay itself?

A. Yes, of course.

Q. In what way?

(Testimony of Don Carlos Atkins.)

A. In any analysis in which there are other ingredients than the active ingredient being analyzed for, those other ingredients may affect the analysis. Therefore, any complete analysis will take into account the excipients which may be present.

In this particular case, we have estradiol as the ingredient which we are analyzing for. In an analysis for estradiol, therefore, we should take into account the other excipients present in that particular mixture.

Q. Now, let us get down to a little bit more common level here. You say you should take them into account. What happens if you do not take them into account?

A. It is my opinion that if you do not take into account each and every excipient present in the tablet, your analysis is open to question.

Q. And open to question in what way?

A. You are not absolutely certain. If you do not take into account these excipients, you are not absolutely certain whether or not you have extracted all the estradiol, or whether or not you have extracted something else which may interfere [166] with the analysis.

Q. You mean something else with the estradiol?

A. Along with the estradiol, which may perhaps interfere with the analysis.

Q. You are familiar, are you, with the excipients that are in this tablet? A. Yes, sir.

Q. The tablets, of course, involved here?

A. Yes.

(Testimony of Don Carlos Atkins.)

Q. Now, in your opinion, are there any excipients present in that tablet which tend to interfere with the assay of the tablet itself?

A. Yes, sir.

Q. What, in your opinion, are those excipients?

A. I think the main excipient that interferes with this particular assay of estradiol is the mineral oil.

Q. And in what way does it interfere?

A. May I explain a bit about the reading?

Q. Yes.

A. In this assay for estradiol, you have to determine the amount of estradiol by measuring the absorption of light which is passed through a solution containing the estradiol.

The absorption of light is proportional to the amount of estradiol present.

If, however, you have some other interfering material, [167] which also absorbs light, it will interfere with the true reading of the estradiol which is present. It is my opinion that such happens in the analysis of these particular tablets.

Q. Have you conducted any experiments for the purpose of determining whether there were any of these excipients that interfered with the assay, and, if so, which ones?

A. Yes, we have conducted such experiments.

Q. Will you go ahead and explain, now, what the experiments were and what you did? What happened?

(Testimony of Don Carlos Atkins.)

A. We have some estradiol tablets here which do have some mineral oil present in them.

Q. You are speaking now of the tablets in question?

A. I am speaking now of the tablets in question, and these tablets do have mineral oil in them. Analysis of these tablets does not, in my opinion, give a definite answer, because the mineral oil interferes with this reading which I just mentioned.

Now, we have made up some other tablets separate from those which are involved in this particular discussion, identical in every respect, except that the mineral oil was left out and the Sterotex was left out. In such cases, the tablet did assay up to the claimed potency.

It was my opinion, then, that the main ingredients which seemed to interfere with this assay were primarily the mineral oil and probably to a lesser degree the Sterotex. [168]

Would you care to have me elaborate?

Q. Go ahead further with the experiments that you conducted along that line.

A. Along that line, we felt that the U.S.P. procedure was not satisfactory for the analysis of these particular tablets.

Q. Can I stop you there? A. Certainly.

Q. Why did you feel that it was unsatisfactory?

A. Because every time we ran the U.S.P. procedure, we had an interference which gave us a higher result of estradiol than we knew to be present in these tablets.

(Testimony of Don Carlos Atkins.)

Q. Can you give me an example of that?

A. We made up a mixture, a batch of tablets, containing all the excipients which were present in this particular tablet in question.

Q. In the same amounts?

A. In the same relative amounts. Then, we analyzed this procedure and these were analyzed by the U.S.P. procedure. In making that analysis, we found approximately .097 milligrams of estradiol present, whereas we only put in .023.

Q. And what did you conclude from that?

A. It was my conclusion that there were interfering materials present in those excipients.

Q. Let us get back to it again. How would [169] those interfering materials interfere with the assay result?

A. They interfered in this manner: the instrument readings which we obtained were greater than those which would be obtained for the concentration of estradiol known to be present in that particular mixture.

Q. All right. Now, then, go ahead.

A. Inasmuch as it was my opinion that this particular procedure was not well adapted to the analysis of estradiol, we developed a modification of this procedure which we are now using. Now, may I discuss that?

Q. Go ahead.

A. This procedure is basically this: We extract the estradiol, using a continuous-extraction device,

(Testimony of Don Carlos Atkins.)

the Soxhlet device which was mentioned previously.

The extracting fluid is ether.

Then this ether extraction of estradiol is evaporated down to dryness in a steam bed under nitrogen atmosphere, and the residue is taken off immediately in ethanol. To this is added sulfuric acid which develops the color.

Now, from the density of this color which is developed because of the addition of the sulfuric acid, and subsequent treatment of the solution, we can determine how much estradiol is present.

I would like to point out that even this procedure which we follow is an improvement over the U.S.P. procedure, because [170] of the fact we do not have a multitude of extractions with the great deal of handling which is involved in the U.S.P. procedure as printed. Even with this procedure we are now using, we still have interference when we have mineral oil present in the mixture.

Q. Did you conduct any experiment with the same excipients as we have here and the same amount of estradiol, but with the mineral oil omitted? A. In an experimental batch?

Q. Yes.

A. Yes. And we obtained 96 micrograms of estradiol present.

Q. How much did you put in? A. 23.

Q. 23 micrograms? A. Of estradiol.

Q. And obtained what, ninety what?

A. 96.

Q. And that was made up in the same way as

(Testimony of Don Carlos Atkins.)

the tablet that we have here, but with the mineral oil omitted?

A. With the mineral oil and the Sterotex omitted.

Q. All right. Then, did you conduct an experiment with the same excipients and a certain amount of estradiol, but with the mineral oil alone omitted?

A. Not using the U.S.P. procedure. [171]

Q. Go ahead and tell us what you did.

A. But we did use this procedure which I have just described, this modification extraction and subsequent color development and reading. In those cases, we did get very good results.

Q. By "very good" you mean what? How much estradiol did you put in and how much did you recover on your assay?

A. We put in 73 micrograms and we recovered 68.5.

Q. Those experiments that you have just related, are those all the experiments that you ran?

A. I think so.

Q. What do those experiments indicate to you, with reference to the interference, if any, of the excipients in the tablet?

A. It is my opinion that the presence of excipients in this particular tablet makes it necessary that an analysis of estradiol be made with full knowledge of the exact excipients in the tablet, and if you do not know what these excipients are, both qualitatively and quantitatively, that is, kind and amount, it would be very difficult to obtain a satisfactory

(Testimony of Don Carlos Atkins.)

analytical value for the amount of estradiol present in the tablets.

Q. By the way, you mentioned, I believe, something about Sterotex. I don't know whether I got it right or not. That Sterotex would not dissolve in chloroform? [172]

A. No. This was what I meant to say. I may not have said this, but what I mean to say is this: This particular tablet in question has Sterotex present. Sterotex is an oily like material. That will dissolve in the chloroform, and therefore it would be carried through the analysis.

Q. In other words, the estradiol dissolves in the chloroform, does it? A. Yes, it does.

Q. And the Sterotex dissolves in the chloroform?

A. Yes.

Q. In other words, the Sterotex is not extracted from the solution you are going to finally read by your machine at the end of the assay?

A. Actually, it is not. The U.S.P. procedure as written would appear to provide for that separation, but in practice it doesn't seem to work out.

Q. Now, in an assay procedure, does the margin of error increase or decrease as the potency of the material being assayed increases or decreases?

A. Well, as the potency of any product decreases, in any word, when you have less amount of material there, your margin of error increases as your potency decreases. As, for example, if we had 100 milligrams of a certain material and you

(Testimony of Don Carlos Atkins.)

lost 1 milligram, that is an error of about 1 per cent.

On the other hand, if you have 2 milligrams of material [173] present and you lost 1 milligram, then you have lost 50 per cent.

Q. Now, coming back to this product here on which I think you stated the ratio of estradiol to the excipients was 22 of estradiol to 324,000 of excipients, would that ratio, in your opinion, have anything to do with the margin of error in the assay?

A. Yes. It is my opinion that that ratio, having a very small amount of estradiol to a large amount of other material, would definitely affect the assay result.

Q. Tell me how it would.

A. In that procedure, one is analyzing for the presence of a small amount of material in a large amount of excipients. That means that the assay procedure must be such as to pick out that particular material which we are looking for, namely, estradiol, it must pick it out of the mixture and must also indicate quantitatively how much of it is present.

Now, if you have only a very small amount of it present, as compared to a lot of excipients, the probability of getting it all out may not be as great as it would be if there were more estradiol present.

Q. Go ahead. A. That was all.

Q. In other words, what you are trying to do is,

(Testimony of Don Carlos Atkins.)

out of a mass of 324,000 other things, pick out 22 of something else? [174]

A. That is exactly it.

Q. All right. Now, you speak about the margin of error in this assay procedure. Explain just what you mean by that.

A. This assay procedure is one which involves a number of steps.

Q. Do you remember how many steps offhand?

A. No. I believe I have it.

Q. If you don't, I have the U.S.P. method here and you can take a look at it.

A. I believe I have a reference here that will help me.

Q. Refer to the U.S.P. XIV method at page 227 and look at the method of assay procedure and tell us again how many steps are involved in that procedure.

A. May I discuss them as I go along?

Q. Yes..

A. The first step in this assay procedure is the weighing out of the material, the powdered tablets.

The second step would be the addition to that of water and alcohol and dilute sulfuric acid.

So that makes two steps.

This material, the alcohol, the water, and the tablets is then extracted with chloroform. That would be one step, except, however, you extract it four times with chloroform.

Q. What do you mean by that?

A. The extraction procedure says that you take

(Testimony of Don Carlos Atkins.)

this [175] alcohol, water, sulfuric acid mixture, containing the tablets. Then you shake that with a certain amount of chloroform four different times.

Now, undoubtedly, most of the estradiol should come out in the first extraction, with progressively less material coming out each time.

Q. Can I stop you as you go along?

A. Surely.

Q. Is that because the estradiol is soluble in chloroform? A. It is.

Q. All right. Go ahead.

A. However, each one of these operations permits a possibility for loss of material somewhere.

Q. In what way?

A. Well, mechanical loss, if nothing else.

Q. What do you mean by "mechanical"?

A. Well, in the handling of the separatory funnels, one has to be quite careful that there is no loss either through leakage around the stopcock or, inasmuch as this is a rather volatile solvent, that none of the active ingredient is lost by means of the solvent blowing out of the separatory funnel. Those precautions can be taken, and should be taken, but I am pointing out that, nevertheless, there still is a possibility of an error creeping in there, a loss. [176]

Q. In an assay procedure such as that, with a material such as you have here, is there a certain amount of the material that will adhere itself to the containers or the glass?

(Testimony of Don Carlos Atkins.)

A. It is possible that there would be some adherence of estradiol to the glass, but because of the solubility of estradiol in chloroform, it is not likely that too much would adhere to the sides of the glass. More than likely what is dissolved in the chloroform would remain dissolved and would not adhere to the glass.

Q. Go ahead with your steps.

A. So we had one step for making up the basic solution. We then extract the chloroform.

Well, we would have one step making up the basic solution. I have mentioned the next step. And if we extract with chloroform, there would be at least three steps. And if we include every step, there would be six.

The next step in this procedure is the evaporation of the chloroform extractions. So, then you transfer your material out of your separatory funnel and put it in some suitable container and again evaporate off the chloroform. Again, the transfer of material raises the possibility of losses.

Q. That is the sixth step, is it?

A. I believe that would be the seventh. This chloroform is evaporated down to a few milliliters. Then, to it is added [177] petroleum benzine.

Then, the mixture is then transferred back to another separatory funnel and you extract that mixture, that is, the petroleum-ether solution of the estradiol.

You then extract that with sodium hydroxide.

(Testimony of Don Carlos Atkins.)

Q. That would be an eighth step?

A. Now, this extraction should be done several times and the petroleum-ether solution is separated from the sodium hydroxide solution.

Then, to the sodium hydroxide solution is added carbon tetrachloride.

Then there is another extraction: You take this carbon tetrachloride solution and wash it with sodium hydroxide solution. That is another step.

Q. That would be a total of nine steps?

A. So there would be nine separate steps at this point.

The main sodium hydroxide, this aqueous extraction, is then acidified and it is shaken with benzine.

Q. Is that the same step or another step?

A. That would be another step. So there would be a total of ten steps.

This benzine solution, then, containing the acid solution of estradiol, is then washed with a sodium carbonate solution, all in the same vessel, so that is really not another step. But then you separate it from this—I [178] should say you wash the acid solution with the sodium carbonate solution.

Q. I just wonder here, without going through the entire procedure step by step, I think I have got ten steps now, can you tell me approximately how many additional steps there would be?

A. Probably two more, minimum.

Q. So there would be roughly or maybe cor-

(Testimony of Don Carlos Atkins.)

rectly 12 steps in the procedure? A. Yes.

Q. In which, in your opinion, a margin of error is a factor? A. It certainly is.

Q. In your education as a chemist did you learn analytical chemistry? A. I did.

Q. Does the assay procedure that we are talking about have anything to do with the analytical chemistry? A. Yes, it does.

Q. In analytical chemistry is or is not the extraction of a certain material from other things in which it is in combination a factor or a problem?

A. It is quite often a factor but not always a problem.

Q. A factor in what way?

A. Well, extraction procedures are an analytical tool [179] and hence can be used in any analytical analysis which one might be interested in, as in this case the U.S.P. analysis.

Q. From your experiments and work with this material that you have related, do you have an opinion as to whether or not the U.S.P. method of assay is or is not suitable to the assay of a product such as this, containing the excipients that it does and 22 micrograms of estradiol?

A. It is my opinion that this assay procedure is not suitable for the particular purpose discussed?

Mr. Elson: Wait now, just a moment.

I think that is all with this witness.

(Testimony of Don Carlos Atkins.)

Cross-Examination

By Mr. Klinger:

Q. Now, Mr. Atkins, I take it, first, from your testimony, all of the testimony that you have given here is strictly your opinion; you have made no analysis of the tablets that are involved in this case, of the shipments in this case?

A. That is correct.

Q. You are basing your testimony as to the content of those tablets on your examination of the work sheets, that is all you testified to, isn't that right? A. That is right.

Q. And if the work sheets are incorrect, then your testimony, of course, is based on a false premise, isn't that [180] correct?

A. No, sir. It is not, not entirely.

Q. Well, if the work sheets——

The Witness: May I qualify that, sir?

Mr. Klinger: Well, let me ask you this.

The Court: Wait. Let him explain his answer.

Mr. Klinger: Yes. All right.

The Witness: My testimony is not incorrect with respect to the chemical points involved, nor is it incorrect with respect to what I said regarding the assay procedure as such.

Q. (By Mr. Klinger): But it would be incorrect with respect to any conclusions drawn respecting the tablets here in question?

A. Inasmuch as the particular tablets in question were not analyzed by me, yes. Otherwise, no.

(Testimony of Don Carlos Atkins.)

Q. Yes, but at the outset of your testimony I think the first thing that Mr. Elson showed you were the work sheets. He said, "You have examined these work sheets, haven't you?" and you said you had. And he said, "You have examined U.S.P. XIV," and you said you had.

Now, then, if the work sheets are not correct, all you know is what you see on those work sheets, about the tablets?

A. No. I know more than that.

Q. About the tablets that were shipped in this case? A. In a sense, yes. [181]

Q. What do you mean by "in a sense"?

A. I am familiar with the manufacturing processes that go on over in the plant.

Q. But you weren't when these tablets were manufactured? A. Absolutely not.

Q. Of course. A. No, sir.

Q. So, you don't know of your own knowledge how these tablets were manufactured, do you?

A. They were manufactured in accordance with the prescribed procedure with which I am familiar.

Q. You don't know what the prescribed procedure was, of your own knowledge, do you, at Crest Laboratories; you never stopped in there until 1950, in July, isn't that right?

A. I have been there since 1950.

Q. In July? A. That is correct.

Q. The tablets involved in this case were manufactured in 1949, and you weren't there then, were you? A. No, sir.

(Testimony of Don Carlos Atkins.)

Q. This was the first job you got, wasn't it, after you left school? A. No. It was not.

Q. Where did you work before that?

A. May I qualify that? It was the first job—after [182] leaving U.S.C. I was unable to continue on my doctorate for financial reasons, but, prior to that, I had been employed elsewhere.

Q. But since you left Southern California, which was the testimony you gave, you went directly to Crest, didn't you; isn't that right?

A. From U.S.C., yes.

Q. Yes.

A. But I am also doing consulting work at the same time, so you cannot classify this only as my first job.

Q. Well, did you do consulting work on estradiol?

A. I did not, but I did in the general field of chemistry.

Q. Yes, but the first contact you had with any alpha-estradiol was at the Crest Laboratories?

A. That is correct.

Q. Now, you described a method here that you contend, in your opinion, based on your training, is a better method of analyzing these tablets, or would be a better method of analyzing these tablets, although you did not analyze these tablets by that method, than the U.S.P. method, is that right?

A. I don't believe I said. I believe what I said is that I didn't think that there was any method that I know of, now, and I am including the U.S.P.

(Testimony of Don Carlos Atkins.)

method as well as our own procedure, when the tablet has these excipients in it, which [183] will give a reliable value for the content of estradiol, so it is my opinion that the U.S.P. method is not applicable, and the other is, our own, for the same reason—interference of excipients.

Q. Well, let us go over that. You say that the method that you have developed, this one that you have described about this extraction with ether——

A. Yes.

Q. ——that is the one substance that is used for the extraction process, isn't it?

A. We have varied that and used chloroform, as well.

Q. In that process, anything that is soluble in chloroform, in ether, is going to stay with the estradiol and be measured after that, is it not?

A. Just as it is in the U.S.P. procedure.

Q. Doesn't the U.S.P. procedure provide steps by which the mineral oil will be taken out?

A. Theoretically, yes, but in my opinion, as a practical matter, that cannot be done. There is a practical limitation, but not a theoretical one.

Q. But in your procedure it is not provided theoretically or practically?

A. Precisely, but I am not applying my procedure to this particular tablet containing these particular excipients. My procedure simply proved that the excipients interfere with [184] the analysis, and if you do not take into account the presence of these excipients, your analysis is in question.

(Testimony of Don Carlos Atkins.)

Q. But doesn't that assume that the excipients remain until the final measurement is made on the spectrograph or the spectrophotometer, isn't that right?

A. That expectation is inherent, yes.

Q. If the excipients are removed prior to that time, they will not interfere with the readings?

A. If they are removed completely, but if they are not removed completely, they will, and in my opinion they are not removed completely in the U.S.P. procedure.

Q. I understand that is your opinion, but with the method you were describing here as the alternative method, they would certainly interfere, because mineral oil and Sterotex would not be removed by ether, would they, or by chloroform?

A. I beg your pardon?

Q. Sterotex and mineral oil are both soluble in ether and chloroform, are they not?

A. They are.

Q. So that when you were going to measure the estradiol under your method, they would certainly be present, those excipients would certainly be present, would they not?

A. Yes, indeed, they would.

Q. And the presence of those excipients would give you [185] higher or lower readings?

A. It would give us higher readings.

Q. As a matter of fact, the presence of excipients, under the U.S.P. method, assuming that some

(Testimony of Don Carlos Atkins.)

of these excipients remain, despite the chemical processes that are described in U.S.P. for the purpose, as you say, of theoretically removing them, what would the result be of the reading taken under the U.S.P. method, higher or lower?

A. Well, now, there is a point here which I would like to bring out.

Q. Just a minute. Will you answer my question?

A. I don't think I can answer that question directly.

Q. I thought you testified on direct that you could get higher readings.

A. On a direct reading, yes.

Q. Yes.

A. Now, here we have readings at two different wave lengths.

Q. Yes.

A. I would like to suggest that this point be considered, then, that you have not measured the absorption spectrum of a mineral oil or a Sterotex, so I am not prepared to say whether or not it is going to be higher or lower. It is my opinion that this procedure in itself does not permit one to make a conclusion, because sometimes you get a high [186] result and sometimes you get a low result in the U.S.P. procedure, depending upon the amount of excipients.

Q. Do you mean to say that you have not measured, by the U.S.P. method, the tablets or tablets similar to the tablets that are involved in this case?

A. No, I do not mean to say that.

(Testimony of Don Carlos Atkins.)

Q. Well, if you had, and the mineral oil and the sterotex, in your opinion, are not removed, and they are there with the estradiol at the time of measurement, what would the reading be? If it is higher under those circumstances, wouldn't it be higher under the U.S.P. method?

A. That is right.

Q. It would be higher?

A. Yes, but sometimes you get a lower reading, due to other interference, losses, and so on, so I do not want to go on the record as saying that the U.S.P. always comes out with a higher result, because sometimes it doesn't, it depends on the technique used.

Q. I am not talking about the technique used. That was your statement, that these excipients interfere with the readings. Now, we are talking about the excipients that you contend under the U.S.P. method get into the final product with the end result that is going to be measured, and with that interference, that interference under your method or under U.S.P., if there is any interference, would give you a higher [187] reading, wouldn't it?

A. That would be my conclusion, yes.

Q. And not a lower reading?

A. No, not a lower reading.

Q. So that an analysis made by U.S.P. of tablets such as these, if that interference existed, would give readings of higher potency than the labeled amount, rather than lower potency, isn't that right?

(Testimony of Don Carlos Atkins.)

A. You don't know what the potency is, because your readings are not indicative of the amount of estradiol. They are indicative of the amount of estradiol plus interference.

Q. But would the estradiol plus interference give you a higher reading?

A. It has in every case we have worked with.

Q. Yes, and so the higher reading would indicate a higher potency, wouldn't it, if someone were translating that?

A. If that translation could be made, yes.

Q. And not a lower? A. That is right.

Q. Talking about the steps in the process, although there are 12 steps as you described—by the way, have you ever counted the steps in the manufacturing process of Crest, each weighing and each measurement and then putting it in this solution, then taking it out of the beakers, and so on?

A. I know there are a lot of them. [188]

Q. Have you ever counted the steps?

A. No, sir, I have not.

Q. There are more than 12, aren't there?

A. I don't think so.

Q. Well, let's see. The first step is when the alpha-estradiol comes in, in bulk. Do you weigh it?

A. Yes.

Q. Then, do you remove from it a certain quantity that you want?

A. You weigh a certain quantity which has been removed. That is one step.

(Testimony of Don Carlos Atkins.)

Q. That is one step. How many excipients are there in this product? A. I don't recall.

Q. Well, are there six, seven?

A. Let us say there are six. I don't remember.

Q. Do you have to weigh each of those?

A. We certainly do.

Q. That means seven weighings there, is that right? A. Of inactive ingredients.

Q. You have to weigh each excipient, don't you?

A. You certainly have to weigh each one.

Q. All right. You have seven weighings there, don't you?

A. You have seven weighings there of inactive materials, [189] and also one weighing of active material.

Q. All right. Then, what do you do next, when you have got this all weighed?

A. Well, of course, the next step would be the checking.

Q. There is another weighing in the checking, then, isn't there?

A. Usually that material is left on the scale and someone just goes up and reads the scale, and the weighmaster goes to another scale.

Q. That is usual, but sometimes it isn't done that way? A. It would be possible.

Q. Now, you have rechecked the weighing and you have this active material. Do you put it in solution? A. We do.

Q. You measure the solution that you are going to put it in?

(Testimony of Don Carlos Atkins.)

A. That is not necessary in this procedure.

Q. You pour it into some kind of a container, the active ingredient, with the mixture, right?

A. The active ingredient is dissolved in a solution.

Q. Is that a process, a step?

A. That would certainly be a step.

Q. You take it out, it is poured out of there ultimately, is it not?

A. That is correct. [190]

Q. Is that a step?

A. Yes, and you wash that with copious quantities of solvents.

Q. All right. We have five up to that point, and we haven't gotten yet to putting it into the mass of excipients, isn't that right? I mean we haven't gotten to the mixing yet.

A. Let's see, that is five steps—how do you calculate five?

Q. Well, you weigh it and you reweigh it, you weigh the quantities that you are going to put with it. A. That is right.

Q. You pour it into solution, and then you remove it from solution, right?

A. That is right. Five steps.

Q. And you haven't started to mix the product yet, have you? A. That is correct.

Q. Now, without taking further time of the court, then, would you say that there are at least as many steps in your manufacturing process as there are in the U.S.P.? A. No, I don't.

(Testimony of Don Carlos Atkins.)

Q. You still don't think there are 12?

A. No.

Q. You think there are 10?

A. I would rather count them and see. [191]

Q. You count them from five on. What do you do next? You pour them into a mix?

A. You pour them into a mixer.

Q. Is that step six?

A. That would be step six.

Q. When it is finished mixing, it is poured out of the mixer? A. Taken out of the mixer.

Q. That is seven? A. That is seven.

Q. After you take it out of the mixer, what do you do with it?

A. That material is then dried.

Q. Where is it taken to be dried?

A. In a drying house.

Q. And it is put out in a drying house to be dried?

Mr. Elson: Just a moment. He is taking it out of the mixer, that is one step, and he is taking it over to put it in a drying house.

The Witness: Yes.

Mr. Elson: He states that is another step.

The Witness: That is one step.

Mr. Elson: I would say that is all one step. Let the witness testify.

The Court: Let the witness testify. Of course, frankly, [192] gentlemen, if you are going to come out with 10 or 12, I can't see the materiality; I frankly can't see the materiality of this questioning.

(Testimony of Don Carlos Atkins.)

Mr. Klinger: The whole purport of the questioning was to show simply that while it is contended, on the one hand, that the manufacturing process cannot possibly result in any loss and does not, yet, because there are 12 steps in the analysis, in that analysis you get all sorts of possibility of error in loss. It was simply that point I was trying to develop.

The Court: Well, counsel, if, as you think, on those steps in the manufacture the responsibility still rests with the manufacturer——

Mr. Klinger: Surely.

The Court: ——at the end of one or five or ten steps, when he gets through, to have the required amount of estradiol in it, what difference does it make whether it takes a thousand steps or five steps?

Mr. Klinger: It was only on that point I wanted to develop it.

Let me ask you this:

Q. With respect to the steps in the U.S.P. analysis, you do not mean to say that a competent chemist, taking the appropriate precautions, would necessarily lose any of the active ingredients? [193]

A. He would not necessarily, but he could possibly.

Q. He might? A. Certainly.

Q. But there are methods of guarding against that, aren't there?

A. One always tries to seek such methods.

(Testimony of Don Carlos Atkins.)

Q. Now, did you say yesterday that magnesium stearate was more soluble than Sterotex?

A. If I did, I was in error. What I meant to say is that the Sterotex is the more soluble material, and that would be extracted into the system along with the estradiol.

Q. And would, therefore, tend to give a higher reading?

A. It would tend to interfere with the reading. I have not measured the interference of Sterotex in itself.

Q. But haven't you already established that the interference would tend to give higher readings?

A. In my opinion, it is established that the interference of all excipients would tend to give higher readings.

Q. And since the Sterotex is more soluble, it would be more likely to be found in the final result that you are measuring, isn't that right?

A. It would be likely to be found in that final result.

Q. That is right. More likely than the magnesium stearate? A. That is correct. [194]

Q. Let me see if I understand this. You say the U.S.P. method provides, theoretically provides, for the removal of all of the excipients we have mentioned here, does it not?

A. I believe it does, yes.

Q. As a matter of fact, the removal of the starch and sugar would come right at the first shake-up, would it not? A. Yes.

(Testimony of Don Carlos Atkins.)

Q. Also your Acacia and talc?

A. The solid materials.

Q. Would go right at the first shake-up, is that correct? A. That is correct.

Q. After the evaporation, and then you are talking about petroleum benzine, that shake-up, the second step there—— A. Yes.

Q. ——isn't that where the mineral oil and Sterotex would be removed?

A. That is where they should be removed.

Q. Now, you say you never measured the end result to see whether the mineral oil you claim would remain, you never measured to see whether it gave a higher reading, or any kind of a reading? A. I don't believe I said that.

Q. What did you say?

A. I believe I said that the mineral oil definitely [195] interfered and gave a cloudy solution at the end.

Q. Gave what kind of an appearance?

A. A cloudy solution.

Q. You reached that conclusion by the appearance of the solution?

A. Along with the measurement.

Q. Oh, you did measure it? A. Certainly.

Q. How do you know that it was the mineral oil that gave it the cloudy appearance?

A. There should be no more than three things in that which will give a cloudy mixture, if the separation of the solutions had been complete: mineral

(Testimony of Don Carlos Atkins.)

oil, Sterotex, and the active ingredient which we are searching for, estradiol.

Q. How many times did you get the cloudy mixture? Did you put it through that second shake-out again? A. Which second shake-out?

Q. With the petroleum benzine.

A. Yes, we did.

Q. And no matter how many times you shook it out, you still got the same cloudy mixture which you say was probably the mineral oil, is that it?

A. Within the number of times we shook it, yes.

Q. How many times did you shake it?

A. We shook it four times. [196]

Q. And you still got the same kind of cloudy mixture? A. That is correct.

Q. Did you measure the end result?

A. The end result to which I thought you were referring was the end result after all the extractions, and it was that which we measured.

Q. Yes, and that is the high reading which you spoke about?

A. The cloudy mixture gave a high reading.

Q. Did you use carbon tetrachloride to remove or attempt to remove the mineral oil?

A. In accordance with the procedure, yes.

Q. I think about the last thing you spoke about was the extraction procedures which you studied in school, is that right? You said they were analytical courses.

A. I believe I did say that.

Q. In analytical chemistry?

(Testimony of Don Carlos Atkins.)

A. That is correct.

Q. Is it or is it not true that every chemist who studies chemistry, and analytical chemistry that you had, learns a variety of extraction procedures of all types? A. That is the usual case.

Q. And that a chemist, a trained chemist, can adapt an extraction procedure to a particular product that he is seeking to analyze? [197]

A. Provided the extraction procedure is applicable to that type of product, in the concentration which is involved.

Q. Yes, but it is not necessary, is it, for a chemist to have a procedure written out for him by someone else as to every tablet, every product, every type of thing on the market, before he can properly analyze it?

A. If he is to get a definitive answer and if there is a possibility of interfering materials, he must know what extraction procedure should be used.

Q. Am I correct, that there are three general types of spectrophotometry, the visual or normal, the ultraviolet and the infrared?

A. They could be classified as such.

Q. And which of these types of spectrophotometers have you used in your training and in your experience at Crest?

A. The first two classifications that you mentioned.

Q. The visual and the ultraviolet.

A. I have not worked with the infrared.

(Testimony of Don Carlos Atkins.)

Mr, Klinger: Just a moment. No further cross-examination, your Honor.

Mr. Elson: That is all.

The Court: I would like to ask him a few questions.

As I understand you, in your experiment, you used 23 micrograms of estradiol. [198]

The Witness: Yes, sir.

The Court: Then you came out with 96?

The Witness: Yes, sir.

The Court: And you attribute that to the interference of minerals?

The Witness: I attribute that to the interference of these other excipients in the tablets, sir.

The Court: The particular excipients, like minerals?

The Witness: Mineral oil and Sterotex.

The Court: Then, if a person conducted an experiment and put in 23 micrograms and came out with 15, would that not be an indication that the person conducting that experiment had successfully avoided interference?

The Witness: It would appear that he had successfully avoided interference with the reading, but that does not mean that interference, in the sense of incomplete extraction, was avoided.

The Court: He got out more than he put in, and the reason that he got out more than he put in, as I understand your theory, was because certain of these excipients which are also soluble join with the estradiol and the result is that when you

(Testimony of Don Carlos Atkins.)

say you have 96, you refer to it as estradiol, but actually under your theory it is a mixture of estradiol and these other excipients joining with it?

The Witness: That is my interpretation, yes, sir. [199]

The Court: So, therefore, if you come out with less than 23, then, certainly nothing has joined in with it, has there?

The Witness: Before I answer that, may I make this comment: that even though a value of 96 micrograms were obtained, that does not mean that all of the estradiol was also extracted. I do not know, and it is impossible to know, whether or not that 96 micrograms of apparent estradiol was 90 per cent estradiol and 10 per cent interfering materials, or the other way around, except as based on the amount of materials that I put in. So I cannot say that I extracted all the estrodiol in that experiment.

The Court: Then I do not understand the effect of your theory of interference, because I had the impression that your theory of interference was that these specific excipients interfered because they were soluble and they also joined the estradiol in the chloroform.

The Witness: That is true, sir.

The Court: And, therefore, when you started with 23 micrograms of estradiol, you ended up with 96 micrograms of what you refer to as estradiol, but under your theory it is not all estradiol, there

(Testimony of Don Carlos Atkins.)

is an addition to it of these excipients, mineral oil and so forth?

The Witness: Yes, sir.

The Court: Now, I understand that is what you mean by [200] interference; in other words, interference causes something to go in. You haven't attempted to explain interference, as I understand it, as something to cause it to evaporate?

The Witness: No, sir; I have not.

The Court: Well, does it?

The Witness: No.

The Court: Then, interference never causes it to evaporate?

The Witness: Not that type of interference, sir.

The Court: Well, there isn't anything in any of these excipients that might be placed in there that would cause estradiol to evaporate?

The Witness: No, sir.

The Court: The only thing they will do will result in addition to the estradiol?

The Witness: Yes, sir.

The Court: That is all.

* * *

Redirect Examination

By Mr. Elson:

Q. The court has just asked you about your theory of interference here by the mineral oil and Sterotex, showing a higher reading. For instance, in the example that you gave, [201] it was pretty

(Testimony of Don Carlos Atkins.)

nearly four times. Now, getting back again, to begin with, in your assay, the purpose of it is to extract the estradiol, the pure estradiol, from these other excipients, is it not? A. Yes, sir.

Q. Do I understand your testimony to be that when the mineral oil and Sterotex are left in, they dissolve with the estradiol and are confused with a final reading at the end of the assay?

A. That is my opinion.

Q. Now, from that, however, are you able to say whether or not, along with the mineral oil and Sterotex, you extracted all of the estradiol?

A. No, sir. I am not able to say—I am not able to say that I extracted any——

Q. Go ahead.

A. I am not able to say that I extracted, by actual observation. I had a mixture which I could not determine how much was interference, these excipients, or how much was actually estradiol.

Q. All right. So, you did your extraction separations and over here you get some material and you run a reading on it and the product has mineral oil and Sterotex in it and your reading shows four times the amount of estradiol that you put in. However, that reading does not indicate to you [202] that you extracted all of the estradiol or that that amount of estradiol is not still in the excipients that remain? A. That is true.

The Court: Well, let me ask you this: If you follow through these steps, you put in 23 micrograms of estradiol and you come out with 96 which

(Testimony of Don Carlos Atkins.)

you formerly referred to as estradiol, after you have made your test, and then, in explaining it, you stated that it was not necessarily true estradiol, it was a mixture of estradiol and those excipients which have joined it——

The Witness: Yes.

The Court: ——probably mineral oil. Now, you say that you do not know that there was any estradiol in there. Well, if you don't know that there was any estradiol in there, then it must remain with the other mass, isn't that true?

The Witness: That possibility exists. I don't know where it is.

The Court: Then, in your runs as you have been explaining it here, and you have been explaining the steps that are necessary, they run three more steps?

The Witness: Yes, sir.

The Court: Incidentally, did you run three more?

The Witness: Following the U.S.P.

The Court: Did you re-extract, then?

The Witness: Yes, sir, we re-extracted. [203]

The Court: Then, when you re-extracted, what did you find out with the second step?

The Witness: That material was just joined with the previous material, so I do not have an answer to that, sir.

The Court: At any rate, finally you came out with nothing, is that right?

The Witness: Oh, from the residue we eventu-

(Testimony of Don Carlos Atkins.)

ally extracted that, so it was not cloudy, so there was no interference.

The Court: So, then, you know——

The Witness: We had everything out.

The Court: By that time you had the estradiol out. Can you tell me, with each of these successive steps, how do you know you got all the estradiol out?

The Witness: Yes, but unfortunately that wasn't read. All we did was just extract it.

The Court: Let me ask you this question: In making all these experiments, you did not carry out any experiments with these particular tablets?

The Witness: No, sir, I did not.

The Court: Were any available to you?

The Witness: Not at the time I was doing this, no, sir.

The Court: Haven't any of these tablets ever been available to you?

The Witness: They are now, sir. [204]

The Court: How long have they been available to you?

The Witness: Possibly a week and a half.

The Court: But you haven't attempted to carry out any experiments with these specific tablets?

The Witness: We have, with the U.S.P. procedure, and we were unable to obtain a reading at all.

The Court: Why?

The Witness: Pardon me?

The Court: Why?

(Testimony of Don Carlos Atkins.)

The Witness: The mineral oil and the other excipients seemed to interfere.

The Court: In the same manner as you have described?

The Witness: In the same manner as I have described, in the experimental batch.

The Court: All right. Then I come back to my question that I asked a few moments ago: You get the same result working with these specific tablets? You have heard testimony about other experiments with these specific tablets. So, in your experience with these specific tablets, you came out with a greater quantity of estradiol?

The Witness: That is right.

The Court: So that, if some other chemist conducted an experiment and came out with less, then he evidently did something different from what you did?

The Witness: He did something different from the U.S.P. [205] procedure, yes, sir, which was what I followed.

The Court: Well, of course, if he followed it, too, and you followed it, then I, as a trier of the facts, must believe that he must have avoided the interference that you encountered didn't he?

The Witness: Apparently he was able, to, yes, sir.

The Court: All right.

* * *

C. E. P. JEFFREYS

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Elson:

Q. Doctor, will you speak up, please, so we can all hear you? A. Yes.

Q. What is your business or profession?

A. I am a consulting chemist.

Q. You hold a Ph.D. degree, do you?

A. I do.

Q. In what? A. In chemistry. [206]

Q. And are you connected with any association or organization here in town?

A. Yes. I am technical director of the Truesdail Laboratories, Incorporated.

Q. Now, will you please give us your educational background, teaching experience, and so on?

A. I hold a bachelor's degree and a master's degree from the University of Texas, and a Ph.D. degree from California Institute of Technology. And I was teaching at both of those institutions during my graduate study days.

I have done some post-doctorate research at the California Instiute of Technology, for two years, in biological chemistry.

That I think essentially is my educational background.

Q. What business is Truesdail Laboratories engaged in?

(Testimony of C. E. P. Jeffreys.)

A. We are a general consulting laboratory, involving analysis of materials, testing and analysis.

Q. And would you say how long you have been connected with that laboratory?

A. I have been there about 15 years.

Q. And in connection with your work there, do you conduct assay of materials? A. Yes.

Q. Now, calling your attention to July 27, 1950, did you receive from the Woodard Laboratories a sample of what [207] purported to be Estrocrine tablets?

A. (The witness refers to documents): Yes.

Q. And did they bear a lot number?

A. Yes, I have Lot No. 004769.

Mr. Elson: Your Honor, I missed this with Mr. Sullivan. I am going to have to call him back for a moment, to connect that up with that number.

Q. You were requested to conduct an assay of that material, for what purpose?

A. For the determination of the amount of alpha-estradiol in the tablet.

Q. Prior to that time, had you been requested to run an assay of similar tablets for the estradiol content? A. Yes, I believe I had.

Q. And who requested you to run it?

A. Mr. Galindo of the Crest Laboratories.

Q. Did you run such an assay?

A. No, I did not.

Q. Why?

A. I didn't feel that there was an acceptable

(Testimony of C. E. P. Jeffreys.)

method available at that time for commercial testing.

Q. That was prior to the adoption of the U.S.P. method, was it? A. It was.

Q. And on or about July 27, 1950, had you become aware [208] that there was an official U.S.P. method? A. Yes.

Q. And how did you become aware of it?

A. I believe we had obtained our copy of the U.S.P. XIV well in advance of the date of its becoming official.

Q. It became official on November 1st, I believe, 1950, did it not? A. Yes.

Q. Did you run an assay of this material?

A. Yes.

Q. Will you tell us what you did, all the way through?

A. Well, we attempted an assay of these tablets by exactly the U.S.P. procedure, that is, carrying out the procedure as specified exactly, taking a sufficient number of the tablets to give 0.2 milligrams of the active material in the test sample.

Due to the low potency of the tablets, the amount of excipients made a very bulky mass; we had to increase the relative amount of solvent in order to handle it, and the assay results we obtained were variable and low.

We felt that our difficulty was in lack of complete extraction of a small amount of active material from the large amount of excipients. So, we, in attempting to improve the efficiency of extraction,

(Testimony of C. E. P. Jeffreys.)

instead of grinding the tablets into a powder and then wetting them with water and alcohol and [209] acid, took the tablets and put them in a Waring blender, with this material, and ran it in order to get a very intimate mixture of the insoluble material with the solvent, hoping to extract a larger proportion of the active ingredient. Even by this procedure, we obtained quite low results.

Q. What results did you get after you used the Waring blender?

A. 9.5 and 9.1 micrograms per tablet.

Q. Now, what does the Waring blender do, so far as extraction is concerned, which the U.S.P. method does not do?

A. Well, it is just a means, between mixing and grinding, of getting more intimate contact between the material which is in large part insolvent and a liquid solvent, in order to more efficiently be able to extract the soluble material from the mixture.

Q. Well, Doctor, am I correct that in this or in any assay procedure the first thing that is necessary is to extract the material that you are going to assay, estradiol here, from the other material, the excipients, which it is in combination with?

A. Yes. The essential thing, in any determination or analysis, is the separation of the constituent you desire to measure, in such a form that it can be measured, the separation from all other materials.

Q. Does the extraction process constitute a problem in [210] analytical chemistry?

(Testimony of C. E. P. Jeffreys.)

A. Yes. It very often is a major problem.

Q. In what way?

A. I might be a little more specific. In materials of this general type, where we have, as a constituent of the specimen or sample, a mixture of soluble and insoluble materials, there is often adsorption on the surfaces of the insoluble material, that is, simply holding of material, which would ordinarily be soluble in the solvent, in a layer, adsorbed, we call it, on the solid particles.

Q. You mean, it sort of sticks to it like glue?

A. Yes. It is essentially an interaction between surfaces, surface versus surface, which is interaction between the molecule that is adsorbed to the solid surface, and it is in some cases quite difficult to remove this adsorbed layer by a solvent which would easily dissolve the material under other circumstances.

Q. All right. Now, I don't know whether you were here yesterday or not, but the testimony was that the quantity of estradiol per tablet here was 22 of estradiol and 324,000 parts of excipient. In your opinion, would that ratio have any bearing on the success of the extraction?

A. Well, yes, of course. If you have an adsorption of the active material, the more free surface of insoluble material there, the more you would expect to be adsorbed, [211] that is, the relative amount that you could get off would decrease with the increase in inactive surface which could hold it back.

(Testimony of C. E. P. Jeffreys.)

Q. Now, in your work, do you find at times that when you are analyzing or assaying a certain product, certain material will be extracted from the mass other than which you are intending to assay?

A. Oh, yes. That is quite frequently the case.

Q. And does that have anything to do with the final result of the assay?

A. Yes, it may well have, if some subsequent step in the procedure doesn't remove it.

Q. Now, take in this case here, how would you know that in your assay procedure all of the estradiol was extracted, or could you know?

A. No, I wouldn't know unless I knew the amount that was put in, and come out—obtained an indication of having gotten the total amount out by the analysis.

Q. By following the U.S.P. method of the assay of a tablet such as this, are you able to say at the conclusion of that assay that all of the estradiol has been extracted?

A. No, not with certainty.

Q. Now, a microgram is what proportion of a gram? A. A millionth.

Q. One-millionth? [212] A. Yes.

Q. Now, considering that small amount, which at least I would think of as being rather infinitesimal, should any of the estradiol be adsorbed to by the excipient in the first place, and not by this process extracted from that excipient, in other words, it remained adsorbed, in your opinion would that have any effect upon the final assay results?

(Testimony of C. E. P. Jeffreys.)

Did you get my question?

A. I don't believe I quite understand you.

Q. All right. Let us assume you are starting out here with an assay of this product, a 22-microgram estradiol tablet. A certain amount of the estradiol is adsorbed, we will say, on the excipient, and during your extraction process with chloroform or ether, whichever you used, all of the estradiol is not taken out of that excipient, it remains there, would that fact have any bearing on your final assay results?

A. Oh, yes, definitely. You would have a low result.

Q. Pardon me?

A. Yes. Your final assay result would be low.

Q. In other words, you would not have the amount of estradiol, we will assume, that was put in there? A. That is right. [213]

* * *

Q. (By Mr. Elson): Dr. Jeffreys, is estradiol an organic substance? A. It is.

Q. Well, what happens with organic substances when they are placed in contact with solid surfaces?

A. In many cases there is a considerable amount of physical adsorption of an inorganic compound, depending upon the chemical structure of the compound, to solid surfaces of various kinds.

Q. Does the amount of excipients in the tablet in proportion to the material to be assayed, the es-

(Testimony of C. E. P. Jeffreys.)

tradiol, have any bearing on the accuracy of the assay results? A. Yes.

Q. And the kind of excipients? A. Yes.

Q. In this U.S.P. assay method, there are some emissible solvent operations, are there not?

A. That is correct.

Q. What is the object of those operations?

A. To effect a separation of the various ingredients of the mixture. In this particular case, the first operation is to extract the estradiol and any other material which may be soluble in dissolving solvents, such as chloroform and ether, to separate those from the material such as the talc [214] and starch and material of that sort.

Q. In any of these operations, are any of them designed to separate the mineral oil from the estradiol? A. Yes.

Q. What operation is that?

A. When the estradiol is in the carbon tetrachloride, then you evaporate that and put petroleum ether in, and then the fatty materials other than estradiol should remain in that organic solvent when you extract with the alkaline solution. The estradiol is soluble in an ether alkaline solution. The theory is that the other fatty materials will not be soluble in the alkaline-water solution, but will remain in the organic solvent solution.

Q. The object is to separate the mineral oil, that is, one of the objects is to separate the mineral oil from the estradiol? A. That is correct.

(Testimony of C. E. P. Jeffreys.)

Q. By the use of these materials that you mentioned? A. That is correct.

Q. Is it possible for some of the estradiol to go along with the mineral oil and be separated from what you want to be the estradiol remaining?

A. It may be possible, yes. I don't know the possibility of estradiol being soluble and held by the mineral oil.

Q. Pardon me? [215]

A. It is possible that some of the estradiol could be held with the mineral oil. I don't have any experimental data on that.

Q. Now, in your opinion, taking a low-potency tablet such as this—and I take it that it is, is it not?

A. Yes.

Q. (Continuing): In your opinion, is it possible for a chemist to make a determinative assay of such a tablet as this, without having a blank tablet, that is, one with the excipients but no estradiol in it, or prior knowledge of the excipients and their quantities?

A. Well, it certainly isn't possible with certainty, no, because you are interpreting the amount of estradiol at the end of the procedure simply on the basis of how much light the solution happens to absorb. You are depending upon your operations to have removed everything except the estradiol and to have removed all the estradiol from interferences and have it in that final solution. If you have a blank of everything except the estradiol,

(Testimony of C. E. P. Jeffreys.)

to run alongside, that is a preferable procedure, of course.

Q. Now, if you had such a blank and you ran an assay of it, what information would that give you?

A. Well, that would give you information as to the possible interference of excipient material in your final determination. [216]

Q. Well, explain how that would show up in the final determination.

A. Well, if you ran a blank on an estradiol unknown, and of course you always run a standard, an estradiol in standard, and if you got 30 milligrams of estradiol in your unknown and you got 5 in your blank, you would say, "Well, I had 25 milligrams of actual; and 5 of that apparent reading in the end was due to something in the blank."

Q. Then, on your assay of the tablet itself with the estradiol in it, you would make allowances or corrections in that for your final reading?

A. You would make corrections for the blank.

Q. Now, in your opinion, is the U.S.P. method sensitive or not as to interference of materials such as excipients?

A. Well, it is a very sensitive method, that is, the actual determination of the active material is a sensitive method, but it is cumbersome and depending upon the amount of excipients it may not be efficient, and the greater the disproportion between the active material and the excipients, the less efficient the method is likely to be.

(Testimony of C. E. P. Jeffreys.)

Q. Would it be possible in using the U.S.P. assay for material to be extracted with the estradiol which was not estradiol?

A. In the first step, certainly.

Q. And on the final reading, then, of course the result [217] would not be accurate, would it?

A. No.

Q. Would it be possible to know, however, with that high result, that the person had extracted all of the estradiol present in the tablet?

A. No. That kind of a result wouldn't be indicative of anything significant.

Q. So, even with a high result such as that, there could be some of the estradiol that would remain in the excipient and you would have no way of knowing about it? A. No.

Q. Now, have you examined the Kober method, the modified Kober method of assay? A. Yes.

Q. I think that is in here, isn't it—and I am showing you Plaintiff's Exhibit No. 3 for identification? A. Yes.

Q. Now, does that method contemplate or provide for the assay of estradiol tablets as distinguished from estradiol alone?

A. No, I don't believe that this method applies to the tablets. It is simply for determination of estradiol.

Q. So it is no method, then, providing for extraction of the excipients or extraction of the estradiol from the excipients? [218]

A. No, I don't believe so..

(Testimony of C. E. P. Jeffreys.)

Q. And if one were to use that method, what would they do as far as extracting the estradiol from the excipients is concerned?

A. They would have to use some procedure for separating the estradiol before they could use it—The Kober method is essentially the development of a color by the interaction of a reagent developer discovered originally by Kober and modified by a lot of other people. It is simply the color-developing agent which acts with estradiol to give you something that you can see or measure in a spectrophotometer. It applies only to the final end measurement of the material.

The most difficult job in any analytical chemist's experience is the separation of the ingredient you want to measure, into a measurable form. The measuring is usually pretty simple.

Q. In the assay or procedure you conducted here, in your opinion, did you or did you not extract all of the estradiol present in the tablet?

A. I don't feel that we did.

Q. Why?

A. Because of the large disproportion between the estradiol and inert excipient materials. I feel that with that enormous amount of inactive material, partly soluble and partly insoluble, that a complex organic compound with active [219] bond such as estradiol has, is in all probability adsorbed on portions of the excipients, or left behind, and that we did not get it all out.

(Testimony of C. E. P. Jeffreys.)

Q. Why do you say that, why do you feel that way?

A. From general experience with the difficulties of extraction of materials, even the simple extraction of inorganic materials like sodium potassium, separations, it is a difficulty that chemists always have. Extraction procedures are the last resort of American chemists. We try to avoid them whereever possibly we can. We always realize that they are relatively inefficient. The phenomenon of adsorption is always a difficult thing to handle, no matter how many times you may wash some talc, for instance. For example, assume that estradiol is mixed with talc, no matter how many times you may wash it with something that will dissolve estradiol, there may still be estradiol adsorbed on the talc, and there is an equilibrium each time you wash it between what is on the surface and what you take off. But after taking off a certain proportion relative to the amount of effective adsorbing surface, the amount you can take off by subsequent extractions becomes smaller.

Q. Now, in your opinion, is the U.S.P. method of assay for estradiol tablets applicable or suitable to the assay of these particular tablets in question?

A. No, sir. [220]

Q. Why?

A. Because the potency, the amount of estradiol relative to the amount of excipients, is too low.

Q. Now, is the doing of an assay the employment of analytical chemistry? A. It is.

(Testimony of C. E. P. Jeffreys.)

Q. What does analytical chemistry teach you to do?

A. To effect the separation of constituents of mixtures and enable you to estimate quantities by some means after you have separated the unknown materials into pure components or a pure component in a case like this.

Q. Doctor, in your opinion, should a competent chemist be able to take an assay procedure set forth in U.S.P., use it for the first time, and do it accurately?

A. If the chemist is a competent chemist and if the method is any good, certainly so.

Q. What is the purpose of U.S.P. methods of assay? Why are they set forth in U.S.P., if you know?

A. Well, the U.S.P. is an official compendium of standard, so-called, official drugs, and, wherever possible, an assay procedure and test of identity are given to enable chemists and pharmacists to determine whether any one batch of drug material meets the standards, the specifications of the U.S.P.

The U.S.P. is essentially a review of specifications [221] and with methods given for determining whether or not any particular batch of material would meet those specifications.

Q. In other words, you feel that a qualified chemist should have no trouble in pursuing a U.S.P. method of procedure?

A. He shouldn't.

(Testimony of C. E. P. Jeffreys.)

Q. In your laboratory are you frequently called upon to conduct U.S.P. assays of products which you have not assayed before?

A. Very frequently.

Q. And it isn't anything uncommon?

A. No.

Q. Just a moment. Doctor, do you recall, without looking at it, what the U.S.P. method states the estradiol tablets usually available are?

A, I think it states the usual dosage is around 0.2 milligrams.

Q. 0.2 milligrams? A. Yes.

Q. It also says 0.1 milligram, doesn't it?

A. 0.1 and 0.2.

(Mr. Elson shows document to the witness.)

A. The usual dose of estradiol, 0.2 milligrams, approximately 1/300 grains.

Q. Let us take a tablet of 22 micrograms. Approximately [222] how much of what proportion of a grain would that be?

A. Well, 22, micrograms—0.2 milligrams is 200 micrograms, so 22 micrograms would be about, approximately, a tenth of it.

Q. A tenth of approximately what?

A. A tenth of 1/300, or 1/3000 of a grain.

Q. It would be 1/3000 of a grain as against 1/300 of a grain? A. Yes.

Mr. Elson: I have no further questions.

(Testimony of C. E. P. Jeffreys.)

Cross-Examination

By Mr. Klinger:

Q. Dr. Jeffreys, the only assay that you did on any one of these tablets are the ones you testified about from that Lot No. 004769?

A. Yes. They were the only ones.

Q. Now, you made assays at two different times, is that right?

A. Well, they were made all at the same time, that is, we tried one procedure and then modified it to a certain extent.

Q. When was that, on July 27, 1950?

A. Yes, between July 27 and August 3, 1950. I don't know just exactly what dates between.

Q. Now, you have testified that, using the new procedure, [223] you ran two assays, did you?

A. Well, we always run our assays in duplicate.

Q. And you got 0.0095 and 0.0091, is that right?

A. Well, as micrograms, 9.5 and 9.1 micrograms. Milligrams would be the figures you gave.

Q. As compared to the labeled potency of 22?

A. Yes.

Q. And have you described to us everything that you did with respect to those assays that you ran through the U.S.P.?

A. Yes. As I stated, we first tried to apply the U.S.P. We were asked to run an assay of these tablets by the U.S.P. XIV method. We tried to do that by the first prescription of the U.S.P. XIV method for that. You take such weight of the

(Testimony of C. E. P. Jeffreys.)

powdered material as to have 0.2 milligrams. We ran into the difficulty there of having too large a mass of inert material to extract with the prescribed amount of solvents. We had to modify it to the extent of using additional solvents.

Q. That isn't unusual with respect to an outlined procedure in U.S.P., they may set forth a typical procedure, and chemists frequently adapt it to the amount or quantity of the drug that they are working with, isn't that true?

A. Yes, you have to make adaptations, depending upon the potency of the drug.

Q. And will you complete your answer, now? I am sorry [224] I interrupted you.

A. We tried to follow exactly as we were instructed, the U.S.P. method. By that procedure we got most variable results. I think the highest one of those that I reported was 8.1 micrograms. The material was so bulky and cumbersome to handle, we made subsequent experiments with the modification of the procedure. Instead of grinding the tablets into powder and then taking a portion of the powder, we simply took tablets and ground them in a Waring blender with the solvents to start with, and started out with the suspension in solution of the material.

Q. And then you completed the rest of the steps as outlined?

A. Then we completed the rest of them exactly with the U.S.P.

Q. So, with the Waring blender check which

(Testimony of C. E. P. Jeffreys.)

you made, or with the adaptation, whatever it was you call it, you got these 9.5 and 9.1 readings?

A. That is correct.

Q. Whereas, before you had gotten the maximum of 8.1, is that correct, on this lot?

A. That is correct.

Q. Now, do you concur with the testimony of Mr. Atkins, who preceded you, that if not all of the excipients in a tablet of this kind are extracted in the extraction process and they [225] are present with estradiol at the time the estimation is made or when the measurement is made, that that will give a higher reading than you would otherwise get?

A. Well, not necessarily a higher reading. If the chemical nature of the excipient which is present with the estradiol at the time of the reading absorbs light, it will give a higher reading.

Q. Yes.

A. We do have cases where the presence of interfering materials react in the other way, by preventing the proper color development.

Q. Do you know about mineral oil?

A. I do not know about the effect of mineral oil in this case. I did not carry out any tests along that line.

Q. You don't know whether the presence of mineral oil would give you a higher reading or a lower reading? A. No. I don't know.

Q. How about the Sterotex?

A. No. I don't know about it.

(Testimony of C. E. P. Jeffreys.)

Q. When you made these assays that you have testified to, did you thereafter check your results by this method that you testified about, of taking a blank tablet and putting in a known quantity of estradiol and then going through the procedure to see whether you extracted the known quantity?

A. No, I didn't. I didn't know what the excipients of [226] the tablets were.

Q. What was that?

A. I didn't know what the excipients in the tablets were. We had no blank material.

Q. So you did not do that?

A. We didn't do that.

Q. Did you check it by putting the remaining mass through again, a U.S.P., to see whether any estradiol remained in the mass that had been discarded? A. No, I don't think we did that.

Q. In your opinion, in the extraction which you made, you removed or extracted and discarded the excipients that were in the tablet?

A. Yes. I think we removed the excipients.

Q. With reference to this surface adsorption that you spoke about, that sometimes exists between some organic substances and other substances—— A. Yes.

Q. ——have you conducted any experiments to determine whether alpha-estradiol adheres to the mineral oil, for example, or to Sterotex?

A. No, sir, I haven't.

Q. So that you cannot say, in your opinion, that

(Testimony of C. E. P. Jeffreys.)

it does adhere, based on any scientific knowledge, that it would adhere, due to these experiments?

A. Nothing from experiments. Simply on the general practice.

Q. That is just based on the general statement that some organic substances do adhere to surfaces of other substances, at certain times?

A. I would say all organic substances adhere to a certain extent.

Q. But many of them are removed from that surface by an appropriate solvent, isn't that true?

A. That is right.

Q. And, so far as you know, that may be done with estradiol?

A. Except from my experience with this particular mixture.

Q. Well, your experience with this particular mixture? Let me ask this: You don't know whether any of the alpha-estradiol stuck to that surface, do you, from the assays you made?

A. No. From the assays we made, I could not say for certain.

Q. So, your answer is, you don't really know whether the alpha-estradiol would stick to the surfaces involved in this tablet?

A. That is correct.

Q. And the conclusion that the result that you obtained [228] was due to the U.S.P. method, the low result you obtained was due to some weakness in the U.S.P. method, is based on what?

(Testimony of C. E. P. Jeffreys.)

A. On my general experience with such methods, extraction procedures.

Q. But you made no test or analysis to determine that?

A. No. I was not retained to make an investigation of this particular thing. I didn't.

Q. And you made none?

A. And I made none.

Q. Well, it is possible, is it not, that the reason you got your low results was that there was no more alpha-estradiol present in the tablet? Is that possible? A. That is possible.

Q. And equally possible with your other theory at least? A. No, I would not agree to that.

Q. Well, you don't know which is more possible?

A. Simply on the basis of professional experience, I have an opinion, and my opinion is that the material is adsorbed to a considerable extent.

Q. Well, you don't know how much alpha-estradiol was put in, do you?

A. I was told the potency, yes.

Q. No, but I mean so far as you yourself are concerned.

A. No, I don't know. All I know is what the label was [229] on the bottle.

* * *

(Testimony of C. E. P. Jeffreys.)

Redirect Examination

By Mr. Elson:

Q. With regard to this extraction process, the first assay that you ran was strictly according to U.S.P., was it not? A. It was.

Q. Can you tell me the results that you got?

A. Oh, we got variable results. We always run tests in duplicate, and the duplication didn't agree at all, so we simply started over and discounted entirely the results.

Q. Your duplicates did not agree, you say, your duplicate tests did not agree?

A. That is right.

Q. Do you consider that a method of assay is an accurate one if duplication of results cannot be obtained? A. No, sir. [230]

Q. Explain that.

A. Well, in any assay, particularly an assay with the difficulty of this sort of thing, an organic analysis, there is going to be certain variability in results, just unavoidable variability.

I think the U.S.P. allows from 90 to 115 per cent, around there, the value of this type of material.

Analytical methods are never absolute. If you analyze a piece of steel, you are not going to come out with 100 per cent of constituents.

The difficulty with organic materials is that your allowable limits of error are somewhat looser. But when you are assaying material of this kind and

(Testimony of C. E. P. Jeffreys.)

you get 20 per cent against 80 per cent, or something like that, then you say there is definitely something wrong, the results are no good.

Q. Was that comparable with the results that you got at first? A. Yes, that is right.

Q. Then you deviated from the U.S.P. procedure to the extent of using the Waring blender?

A. Yes.

Q. And the purpose of the Waring blender was specifically what?

A. Specifically to try to get more intimate contact between the solvent and the large mass of excipient material, [231] with the hope of being able to get a more complete extraction from the excipient material.

Mr. Elson: That is all. Thank you.

Recross-Examination

By Mr. Klinger:

Q. With respect to your answer that if you failed to get duplication of results in connection with particular tests, then, in your opinion, that would constitute some reflection on the test, wouldn't it also depend on whether you were using a uniform substance to test?

A. Oh, yes. If your sample is not uniform—of course, in this particular case you have pretty well eliminated that by grinding the material, and you have a finely ground powder, and the possibility of nonuniformity in two little batches is not very great.

(Testimony of C. E. P. Jeffreys.)

Q. Except they are different batches of tablets being used?

A. Yes. If you have different samples of test material, yes, that might be the case.

Q. Was this the first assay you actually made after telling Mr. Galindo there was no method prior to that? A. Yes. This is the first one.

Mr. Klinger: Nothing further.

Mr. Elson: That is all. [232]

* * *

The Court: Doctor, as I understand your testimony, after you made these tests, you made a U.S.P. test and got 8.1, something of that sort, and then you made this modified test, using what you referred to as the Waring blender, and you got 9.5?

The Witness: Yes. That is right.

The Court: It had been represented to you that these tablets contained 22 micrograms, is that right?

The Witness: That is right.

The Court: After making the test, you found them to contain 9.5?

The Witness: That is right.

The Court: Your analysis showed that?

The Witness: Yes.

The Court: And it is your opinion that there was some left in the residue that you couldn't test?

The Witness: That is right.

The Court: Now, do I understand it to be your opinion that there was left in there 12½ micrograms, in the residue, in other words, that in a test of that kind you can't extract half of it?

(Testimony of C. E. P. Jeffreys.)

The Witness: Yes, I think it is entirely [233] possible.

The Court: In other words, it is your opinion that there were 12½ micrograms left in the residue?

The Witness: Yes, and that is an extremely minute amount.

The Court: What?

The Witness: That is an extremely minute amount. If the tablet had been a U.S.P. tablet, it would have been 200 micrograms, and if you left 12½ micrograms in it, the percentage would be quite small.

The Court: Then, as I understand it, it is your opinion that there is no known method to the science of chemistry by which you can analyze a tablet such as this, with 22 micrograms, and determine whether or not it actually has 22 micrograms?

The Witness: I don't know of any method that I would feel happy with, that I would like to depend upon it.

The Court: Well, I am not talking about whether you would be happy with it, but from your statement here now, in making an analysis of a tablet that is supposed to have 22 micrograms, the maximum that you came up with was 9½, and you made no other tests, and then I take it it would be your opinion that there isn't any way that you can make a test to determine whether or not there are 22 or approximately 22 micrograms in the tablet as represented?

(Testimony of C. E. P. Jeffreys.)

The Witness: That is right.

The Court: OK.

(Witness excused.) [234]

Mr. Elson: May I call Mr. Sullivan for just one question?

The Court: Yes.

JOHN L. SULLIVAN

recalled as a witness on behalf of the defendants, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Elson:

Q. In connection with this sample that you sent over to Truesdail Laboratories, what was the Woodard lot number of that sample? A. 107694.

Q. And 107694 is the subject of counts V, VI, IX, and X in this case. Did you assign to that a number other than Lot No. 107694?

A. Yes. We assigned Lot No. 004769.

Q. And why did you do that?

A. Because we had sent out so many other samples of this 107694, for analysis, that we decided, in order to avoid all confusion and get a true particular tablet, we would give it another number, and we had an affidavit signed to show that.

Mr. Elson: That is all.

Cross-Examination

By Mr. Klinger:

Q. I will first ask you, you did leave it in the same package? [235]

(Testimony of John L. Sullivan.)

A. No. I think we put it in a bottle.

Q. How did you know that it was supposed to have 0.022?

A. Because we put a label on the bottle.

Q. You put a label on the bottle saying what the potency was supposed to be?

A. The identical label on the bottle that is on the package. We put a new lot number on the label.

Q. And that was 107694?

Mr. Elson: No. The old one was 107694.

Mr. Klinger: The one we are talking about in this case, I mean the one we referred to was 107694.

Mr. Elson: Yes.

* * *

ROBERT ELLIS HOYT

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Elson:

Q. Doctor, where are you employed at the present time, and how?

A. At the present time I am employed in the division of laboratories in the Cedars of Lebanon Hospital in this city. [236]

Q. Since how long?

A. Since January of this year.

Q. Let us go back, and will you tell me what

(Testimony of Robert Ellis Hoyt.)

universities you attended and what degrees you obtained, and so on?

A. From the University of Washington, I obtained the degree of Bachelor of Science.

Q. In what year?

A. In 1933, I believe. Then, in 1934, I received a Master of Science degree at the University of Minnesota; and in 1939 I received the degree of Ph.D. in the same school, University of Minnesota.

Q. What was your major and what was your minor?

A. My major field, bacteriology, urinology, and pathology.

Q. Will you tell me, please, the academic positions that you have held from the beginning?

A. Well, from the beginning——

Q. Well, can you do it without a list?

A. Yes, I think so.

My first academic position was a teaching fellow, subsequently instructor, at the University of Minnesota.

Q. Wait a minute. Any particular school at the University of Minnesota?

A. The medical school, and the school of medicine. I then was instructor at the school of medicine, University of [237] Utah.

Q. Instructor in what?

A. It was in the department of bacteriology and pathology.

Q. And what years were you there?

(Testimony of Robert Ellis Hoyt.)

A. I think it was 1941-42. I could be a little off. I think in 1942 I left there.

Subsequently I was associated with the College of Medical Evangelists of this city, where I was co-director of the Institute of Experimental Medicine of that school.

Q. The College of Medical Evangelists is more commonly known as the White Memorial Hospital, is it not?

A. Well, the White Memorial Hospital is the teaching unit of this school.

Q. It is what?

A. It is the teaching unit of that school. That is, it is a charity hospital which is used, together with the Los Angeles County General Hospital, as the teaching unit for the medical students.

Q. Will you tell me, right there, what were the functions of the Institute of Experimental Medicine there?

A. Our principal function was to carry out experimental studies in medicine and related fields, and it was our duty to perform or to supervise the performance of various laboratory procedures which were considered to be too delicate or [238] difficult for the average laboratory personnel to carry out properly.

Q. In connection with that work, did you conduct assays of materials from time to time?

A. Yes. That was an important part of our procedure there.

Q. Go ahead with that.

(Testimony of Robert Ellis Hoyt.)

A. Well, the assays which would be most applicable here, I think, would be assays for various steroid hormones of the sex hormone and the adrenal cortex type which are excreted in different proportions, and under different conditions, with various dose proportions.

Q. What is a steroid hormone?

A. A steroid hormone I think we could broadly define as a hormone which is constructed on the general cholesterol, actually the vitelline nucleus. That is, it is a hormone of a particular class.

Q. Go ahead. A. Where?

Q. You were discussing experimental methods.

A. Yes. And we carried out determinations of such particular substances in various body fluids and tissues of patients, including estrogenic and urinogenic hormones and adrenal cortical hormones of that sort.

Q. Did you hold any other position there at the College of Medical Evangelists? [239]

A. Yes. At that time I was associate professor in the department of bacteriology.

Q. Now, continue, if you will, please, with the other academic positions you held.

A. Well, after terminating my position there, I spent nearly a year at Salt Lake City, where I was biochemist with the Veterans Administration and held an assistant clinical professorship in the department of pathology.

Q. Go ahead.

A. I was going to say, at the present time, in

(Testimony of Robert Ellis Hoyt.)

addition to my position with Cedars of Lebanon, I have an assistant clinical professorship in the department of infectious diseases at the University of California at Los Angeles.

Q. Prior to that, or at any time, have you held a position with the University of Southern California medical school?

A. Yes. I have lectured there as a lecturer in the department of bateriology.

Q. Over what period of time?

A. Well, it was during the war. I think I could give you the exact dates. Probably from 1942 or 1943 up to about 1949.

Q. Did you hold some position with the University of Utah school of medicine?

A. I believe I mentioned that.

Q. Oh, did you? [240] A. Yes.

Q. And your present position is with the Cedars of Lebanon Hospital in the division of laboratories? A. That is right.

Q. Have you written papers having to do with scientific subjects?

A. Yes. I think I probably have published about 35 papers.

Q. Have any of those papers to do with the subject of estradiol or a related drug?

A. Well, we developed and evaluated an assay procedure for pregnandiol appearing in the urine of pregnant and non-pregnant women, which I would say is a related field, since the drugs are structurally related and behave similarly and the

(Testimony of Robert Ellis Hoyt.)

problems of extraction and evaluation are roughly the same.

Q. To refresh your memory, am I correct in saying that the title of that paper was "An Improved Procedure for the Quantitative Estimation of Urinary Pregnandiol"?

A. Yes. That sounds right.

Q. And was that paper prepared in conjunction with someone else?

A. Yes. Dr. Raymond Mitchell, who was co-director of the institute with me, was listed as author.

Q. Can you tell me in what medical or scientific journal that article appeared? [241]

A. I believe it was the Journal of Clinical Endocrinology, about February of 1950.

Q. Did you receive some tablets from the Crest Laboratories sometime in the middle part of this year, I believe? A. Yes. We did.

Q. Will you tell me what you received and when you received it?

A. What we received I can tell you. I can't tell you approximately when. I could check my files. But, at any rate, we received two large bottles containing tablets, and one bottle was labeled "Placebo Tablets" and the other bottle was given a serial number which I cannot recall from memory, which was stated to contain, that is, the tablets were stated to contain 23.3 micrograms of alpha-estradiol, that is, per tablet.

(Testimony of Robert Ellis Hoyt.)

Q. Before we go further, will you explain what is a placebo tablet?

A. Well, a placebo tablet is a tablet—I think the term is probably not used quite properly; at least it is usually used to describe a tablet that is given to a patient, which contains no medication, that is, for the psychological effect which it may exert.

Usually we mean, by a placebo tablet, a tablet that does not contain an item or certain items which are the subject of some investigation, that is of an unknown property or amount. [242] It is a blank tablet, we call it.

Q. All right. After having received those tablets, will you please go ahead, now, and in your own words tell us what you did with them?

A. Yes. Well, the problem, as we conceived it, was to determine, on the basis of assay reports which we had been given orally from yourself, if possibly these reports were correct or if there might be some difficulty involved in the extraction or the processing of the tablets which would actually cause the result to be erroneous.

First, we put the tablets through the prescribed U.S.P. process. And do you want me to refer to the steps?

Q. No, I don't think it is necessary.

A. We followed the U.S.P. method as exactly as it was possible for us to, and made a determination, and the results as our—Do you have the figures that I could refer to? Dr. Sobel has a copy, if yours is not available.

(Testimony of Robert Ellis Hoyt.)

The Court: While he is getting that document, may I ask you this——

The Witness: Yes.

The Court: I don't know whether you inadvertently said it, but do I understand you to say that those tablets were supposed to have 23.3——

The Witness: Micrograms.

The Court: ——micrograms? That is correct, that is what [243] you meant to say?

The Witness: Yes.

(Mr. Elson hands paper to the witness.)

The Witness: Yes, this is mine.

Now, we processed these tablets, which I can now state were described to us as No. 2571-B.

Q. (By Mr. Elson): Just a moment. I have here the original of this chart that you made up. Are you going to use that, or have you prepared another chart for the use of the court?

A. Well, I have a rather crude chart here, which does not contain all this material but which might be useful for visualizing it.

Q. You might do that. I don't know that we need to introduce this into evidence, but if your Honor cares to have it before you—I have handed a copy to Mr. Klinger, and this you could use yourself in following his testimony, if you wish.

The Court: Very well.

Mr. Elson: I will put this over here. When you come to the point where you think it becomes useful, you may take it.

The Witness: Yes. It may not be necessary.

(Testimony of Robert Ellis Hoyt.)

At any rate, we processed the tablets according to the prescribed procedure and weighed out a sufficient quantity of the specified tablet to contain 23.3 micrograms, according to the labeled [244] potency.

This batch of material allegedly containing 23.3 micrograms was processed according to the method.

A sample alleged to contain 23 micrograms was then used in developing the color according to the prescribed Kober modification.

At the same time a standard estradiol solution was prepared from a crystalline alpha-estradiol product which we received at the same time from the Crest Laboratories.

Q. (By Mr. Elson): May I stop you there?

A. Yes.

Q. Did you run all these at the same time?

A. No. We didn't. I will explain a little later which we ran simultaneously.

Q. Before you come to that, is this the standard U.S.P., in this first horizontal column that we have, "Standard 200 micrograms"? A. Yes.

Q. What do the figures in that column indicate?

A. They indicate the amount of estradiol calculated to be present or assumed to be present in the case of the unknown tablet. In other words, that is the amount of estradiol that is actually processed according to the requirements of the U.S.P. method.

(Testimony of Robert Ellis Hoyt.)

Q. What do you mean, according to the practice?

A. Well, it says in the U.S.P. that you can select an [245] amount to contain approximately two-tenths of a milligram and extract this, such and such.

Q. That is, what that first horizontal column means is that you took a sample containing 20 micrograms of the pure estradiol, and the readings on the colorimeter showed those two figures that immediately follow? A. Yes.

Q. The next horizontal column says "Standard USP Method 200 micrograms."

A. Yes. Let me explain that.

Q. And the sample contained 20 micrograms, and so on. What?

A. Let me explain that.

Q. All right.

A. It is obvious that if we took a liquid containing 20 micrograms of an estradiol and put it in the top of a separatory funnel and draw it out at the bottom, you will not draw 20 micrograms out.

Q. Why?

A. Because some of it is going to cling to the walls of the vessel, and although you rinse and wash it, you cannot be perfectly certain it is all coming out.

There is inevitably a loss whenever you have a transfer of fluid from one funnel to another.

So the U.S.P. method contains a method by which correction [246] for a loss is presumed to

(Testimony of Robert Ellis Hoyt.)

be made. That is to say, you take a standard solution containing a small amount of estradiol, represented by weight, and you process that by going through all the steps and all the procedures identically with the sample which is being tested, and this standard, the prescribed standard, is considered to compensate for handling losses and for solubility losses which will occur as it is passed from one solvent to another and from one container to another.

So the second horizontal column here describes the results which we obtained when we processed the U.S.P. standard according to the U.S.P. method.

Q. That is the U.S.P. standard for pure estradiol? A. That is pure estradiol.

Q. By "U.S.P. standard," do you mean the U.S.P. reference standard?

A. Well, I apologize. The vial which we received was simply labeled "Estradiol, U.S.P."

Q. U.S.P. standard, so far as the content of it is concerned?

A. Yes, the contents, the constituents, the optical rotation and so on, are alleged to be in conformity with the U.S.P. standard.

Q. All right.

A. All right. So this was processed. We think it is [247] obvious that you will not recover 20 micrograms of alphaestradiol after you have treated it under all of this extraction, the partitioning and separating, and it was our first interest

(Testimony of Robert Ellis Hoyt.)

to discover exactly how much we would recover if we took the pure standard estradiol solution without the presence of excipients, according to the U.S.P. procedure.

To determine the amount of loss, we must compare this recovery with estradiol which has not been processed. The difference between the color developed by 20 micrograms of estradiol and the color developed by the residue from 20 micrograms of estradiol, after extraction, represents the loss which you must regard as inevitable in this method.

And actually we find that instead of a test tube containing 20 micrograms of estradiol, which would have been the anticipated result, that is, the theoretical yield, we recovered 14.5 micrograms. This value is shown in the fourth column.

The first two columns contain the colorimeter readings upon which the calculation of the micrograms present was made, in accordance with the U.S.P. formula, so we recovered 14.5 micrograms out of 20 micrograms which were actually known to be present at the beginning of the test.

This represents a recovery of 72.5 per cent, and by applying the correction factor—that is the reason we do this, is to obtain the correction factor—we are back to 20 [248] micrograms.

This correction factor is necessary to convert this standard to a 100 per cent strength. This amount of loss we can anticipate will occur within the error of the method, wherever you extract 20—

(Testimony of Robert Ellis Hoyt.)

let us say 200 micrograms of estradiol—and read 20 according to the U.S.P. method.

Now, applying the same procedure to the test tablets, we took a tablet alleged to contain 233 micrograms and extracted and read a one-tenth aliquot according to the procedure, of what it would be considered or expected to contain. [249]

* * *

Q. Dr. Hoyt, do you have that chart there?

A. Yes.

Q. I wish you would briefly start in with those horizontal columns again and briefly explain what they are, up to the point that you reached. Take that first horizontal column, "Standard 200 micrograms," what does that mean?

A. That means that a standard solution containing 200 micrograms, in a specified volume, was prepared, and from that standard estradiol solution a sample containing 20 micrograms was withdrawn, dehydrated, dried down, I should say, dried down and treated with the colorimertic procedure. The colors of this sample then were determined by the spectrophotometer, and the readings which were obtained are recorded in the next two columns. This is our basic value here which is used in computing the amounts of estradiol to be found or to be extracted from subsequent species.

Q. This was not an assay procedure? [250]

A. No. This was not an assay. This is our color standard, that is, this shows what color will be developed by 20 micrograms of estradiol under the conditions of a color-developing reaction.

(Testimony of Robert Ellis Hoyt.)

Q. What do you mean by the use of the word "standard" there?

A. Well, "standard" refers to pure crystalline estradiol prepared by weight in volume so that each cubic centimeter of the standard solution contains a total amount of alpha-estradiol.

Q. Let us go to the next horizontal column.

A. This refers to a sample of this same standard solution which was not processed directly for color development but which was first put through the U.S.P. extraction procedures, and the purpose of this procedure is to compensate for losses which will occur to this 20-microgram sample as it is carried through the U.S.P. procedure.

Q. Now, losses occasioned by what?

A. Losses occasioned, I would say, primarily in this case by solubles, that is, the procedure presumes that when you extract an aqueous solution of estradiol with chloroform, that all of the estradiol is going to move from the water into the chloroform, and we know that is not the case. Some of the estradiol remains behind. It is the same way when you go back from the chloroform or from the petroleum ether, back into the [251] aqueous phase. Some of it remains behind. There is not complete partitioning between these two fluids.

Q. Go ahead.

A. So we carried out this determination and measured it against the color developed by 20 micrograms, and showed that actually 20 micrograms did not pass through the extraction procedure, but that

(Testimony of Robert Ellis Hoyt.)

there was a loss along the way, and the actual recovery amounted to 72.5 per cent of the total amount originally present.

Q. Or a loss of 27.5 per cent?

A. Yes. This loss would be consistent with good practice in carrying the estradiol through the procedures of the assay, and such a loss you would expect ordinarily to occur.

Q. With any assay?

A. With any assay involving these same steps, you would have at least that much loss. You might have more.

Q. Go ahead, now, with the next column.

A. The next column includes the figures which resulted by grinding up the tablets which were supplied to us, and these tablets then were processed according to the U.S.P. procedure for estradiol tablets, and when we developed the color on the resulting sample, we found that instead of 23 micrograms, which was calculated to be present, actually only 10.1 micrograms were present.

Now, from the second column we learn that a certain loss [252] must be allowed as the procedure develops, but correcting for that loss by adding 27.5 per cent to the amount recovered, we reached, in the next to the last column, the value of 13.8 micrograms, which is the corrected yield of the extraction of the estradiol tablets; in other words, a 60 per cent recovery was the best that was obtainable, even allowing for the standard loss of the U.S.P. method.

(Testimony of Robert Ellis Hoyt.)

Q. Have you finished, then, with that?

A. With that column.

Q. All right. Then, in the fifth vertical column, in that horizontal block there, the 10.1 micrograms recovered represented 44 per cent of the alleged potency, is that right? A. That is right.

Q. And then you took 44 per cent of 10.1?

A. No. We added 27 per cent of 10.1.

Q. Yes.

A. Because 27 per cent is the loss.

Q. You took 27½ per cent of 10.1 and added it to 10.1? A. Yes.

Q. And got 13.8? A. Yes.

Q. Which, in the final column, meant, with making that correction, there was only a 60 per cent recovery?

A. That is correct. We had lost 40 per cent more than we were allowed by our knowledge of the workings of the test, [253] that is, that is gone somewhere, that is, if the tablets actually contained 23.3.

Q. Now, coming down to the next horizontal column, what happened?

A. Well, at this point we were faced either with the proposition that the tablets contained the stated potency and that their extraction was not being completed, or that there was less estradiol present than there was alleged. In order to test this, we ground up tablets which were stated to be of the same composition as the previous lot, with the exception of the estradiol which was not present, and

(Testimony of Robert Ellis Hoyt.)

to this ground-up powder we added, by means of a volumetric by-pit, a specific known amount of estradiol, so that we actually placed the estradiol into the material which was about to be extracted. Only that amount of estradiol was there.

Q. Why did you pick 20 micrograms instead of 22?

A. Because our standard solution is made up to 200 micrograms per ml., and in order to make accurate delivery it is better to deliver to gradations on your by-pit, rather than to estimate intervals between, so it is purely a matter of convenience that we selected 20. We might just as well have taken 30 or 15. It was probably a figure selected as being easily measured and approximating the 23.

Q. All right. Go ahead.

A. When we processed this mixture of excipients plus [254] estradiol, we were able to recover 10.1 micrograms, as against a supposed recovery of 20 micrograms. That is an uncorrected recovery of 50 per cent, roughly.

Again applying our 27.5 per cent correction factor for the inherent loss, we reach a value of 13.8 micrograms actually accounted for of the original 20, which means that only 69 per cent of the estradiol could be accounted for in the process of extraction. Some we recovered. Some we recognized would be lost, but there is an additional loss which was not accounted for in these values.

But our conclusion was that all of the estradiol

(Testimony of Robert Ellis Hoyt.)

is not recoverable when it is held in excipients of the sort that were found in this tablet.

Q. And are not by the U.S.P. method?

A. And are not by the U.S.P. method.

Q. Let us take the last horizontal column. What does that mean?

A. Well, this last column is a rather rough attempt to demonstrate the presence of more estradiol than the U.S.P. method permitted.

In this test, we ground the tablets containing estradiol—this was not estradiol which we added, but were the tablets of the Lot No. 2571-B. We ground tablets sufficient to contain 233 micrograms.

These tablets were then placed in a Soxhlet extracting [255] device, in a thimble, extracted continuously with ether for at least 12 hours, around 12 to 18 hours overnight.

Then, the ether extraction was processed and the colors developed. The reading is shown here, and a recovery of 16.4 micrograms was obtained.

Now, since we were not interested in devising an assay method, we did not calculate the inherent loss of this method. We would understand, of course, that there will be such loss.

So, this 16.4 micrograms recovered represents the minimum amount of estradiol which could possibly be present. There is no point in hypothecating a loss value here, so I won't do it, but the point remains that even without correction, by this type of extraction, the dry extraction, we were able to recover more estradiol from these tablets than the

(Testimony of Robert Ellis Hoyt.)

U.S.P. method allowed, even correcting for the loss.

So it was our conclusion, based on this work, that actually there is more estradiol present in these tablets than the U.S.P. method reveals, but that some factor or factors operating in the test prevents recovery of the estradiol quantitatively.

Q. I notice in connection with these tablets, No. 2571-B, they were labeled or represented to you to contain 233 micrograms, is that right?

A. That is the amount we took. They were labeled to contain 23.3, yes. [256]

Q. Would your conclusions be any different had the tablets been 22 micrograms?

A. No, no. That is an insignificant deviation there—if it were 22 or 20.

What we are concerned with here is a situation where some of the estradiol is restrained from participating in the color reaction, that is, it is not extracted, and this is independent of the exact amount which is incorporated in the tablet. We have to know the exact amount to calculate it, but the same factors would operate even though the tablet were different.

Mr. Elson: Your Honor, I wonder if I might at least, for purposes of illustration, offer the chart that you have, in evidence, and hand you a copy of it.

The Court: You may. Is that the same as the copy I have?

Mr. Elson: The one that you have is the orig-

(Testimony of Robert Ellis Hoyt.)

inal, or I can put a copy in. It does not make any difference.

Mr. Klinger: That is for illustrative purposes only?

Mr. Elson: That is all.

The Clerk: That is Defendants' Exhibit I, in evidence.

(The chart referred to was marked Defendants' Exhibit I and received in evidence.)

Q. (By Mr. Elson): Now, Doctor, in your opinion, is it possible for a tablet such as the one we have involved here to contain a labeled potency of 22 micrograms and still, on a U.S.P. assay, show materially less? [257] A. Yes.

Q. Why?

A. Well, that is my opinion because we found it to be so.

To explain the situation, I would presume that something in the excipient is preventing the estradiol from being extracted. That would be my conclusion.

I must say, I have not investigated the cause of this, but, in my opinion, it would be due to the restraining, probably in the extraction procedure rather than in the subsequent purification.

I would say, first of all, that when a tablet of this sort, containing a good deal of insoluble material, is shaken with a mixture of chloroform and water, there will be variable amounts of emulsions present. Now, this emulsion will vary, depending

(Testimony of Robert Ellis Hoyt.)

on how briskly the separators are shaken, and the emulsion, of course, contains both chloroform and water, in addition to the inert particulate matter around which it is built.

Now, this chloroform which is present in the emulsion we can presume has extracted estradiol just the same as the other chloroform has, before the emulsified layer is allowed to break, but it is very difficult for these emulsions to break completely when there is so much extraneous material present.

So, any estradiol that remains in the emulsion will be [258] discarded and will not appear in the final assay.

Then, there is the problem of the estradiol being dissolved on the surfaces of some of these small particles of insoluble material, which I think is a very important factor, but again, as I say, I have not made a study of this phenomenon in connection with these tablets.

Mr. Elson: Cross-examine.

Cross-Examination

By Mr. Klinger:

Q. Dr. Hoyt, as I understand your educational background and training, it has been primarily in bacteriology and pathology, has it not, both your teaching and your formal education?

A. Those are the subjects in which the degree was granted, but you must realize that to qualify

(Testimony of Robert Ellis Hoyt.)

for such degree, and particularly at the present time, it is essential to have a thorough grounding in the whole field of biochemistry as a general science and particularly in relation to the practice of pathology, which is more and more becoming a biological or biochemical field.

Q. Your teaching at the University of California, for example, is in infectious diseases, is it not?

A. Yes.

Q. And you were a bateriology professor at some other time? [259] A. That is correct.

Q. Do you consider yourself a chemist?

A. Oh, yes. The Government, as a matter of fact, considers me one. You will recall that I was employed by the Veterans Administration as a biochemist.

Q. As a biochemist, did you run assays on estrogenic hormones?

A. We had not the occasion to do any while I was there. However, we were equipped to and would have, had the need developed.

Q. Yes, but you didn't do any there?

A. No.

Q. Regarding the paper that you referred to, this assay of this particular drug, that was not an estrogenic hormone either, was it?

A. Not estrogenic in that it produces the estrus phenomena in animals. However, it was the female sex hormone.

Q. Yes, but not estrogenic hormone like alpha-estradiol? A. True.

(Testimony of Robert Ellis Hoyt.)

Q. Let's see what happened, how you got this material for these tests, that you tested, that you conducted tests of. I think you told us that you received two bottles. A. By post.

Q. By mail? A. Right. [260]

Q. And were the bottles labeled? A. Yes.

Q. And how were they labeled?

A. They were labeled with a gummed label and typewritten on one was the legend "No. 2571-B."

Q. 2571-B?

A. Yes. And, as I recall, the estradiol content was stated in milligrams, 0.0233 milligrams per tablet. That is my recollection. I could verify it.

Q. That was a bottle of tablets?

A. Right. The other bottle was simply labeled "Placebo Tablets."

Q. "Placebo Tablets"?

A. Yes. No estradiol contained.

Q. Did they also send you the pure alpha-estradiol that you used in the first?

A. That is correct.

Q. When did that come?

A. It came at the same time.

Q. Was that in a bottle, too?

A. It was. It was in a separate bottle.

Q. It was in a separate bottle?

A. Yes. There were three bottles in the wrapped package which we received.

Q. What about the third bottle, how was that labeled? [261]

A. Labeled "Estradiol U.S.P." and the name

(Testimony of Robert Ellis Hoyt.)

of a pharmaceutical supply house, not Crest Laboratories, which I do not recall at the moment.

I might add at this point that we checked the standard solution of alpha-estradiol which we prepared against the alpha-estradiol we obtained from Dr. Clare Zagel at the University of California, and agreement was essentially complete, that is, very close.

Q. Well, did you get any estradiol, then, from the U.S.P.? A. No.

Q. Then, when Mr. Elson said to you that you were using standard reference U.S.P. estradiol, you did not mean to answer "Yes" to that?

A. I don't believe I did. I think I said we used U.S.P. estradiol, but I did not say it was reference standard. I would assume that reference standard would be something retained by the U.S.P.

Q. And obtained from U.S.P. by those who purchased it or asked them to send it, is that right?

A. That is right.

Q. But you did not have that?

A. No. We did not have the U.S.P. reference standard.

Q. You say you compared the alpha-estradiol, or what was stated on the label to be alpha-estradiol, with some other [262] alpha-estradiol that you obtained from someone else?

A. That is correct.

Q. And that is the alpha-estradiol that you are speaking about, that you used throughout these tests, is that right? A. That is right, yes.

(Testimony of Robert Ellis Hoyt.)

Q. Now, where did you get your instructions as to what to do with the three bottles?

A. Well, it was primarily the idea of Dr. Sobel and myself as to what to do with them. That is, we conceived the idea of adding estradiol to the placebo and attempting to extract it.

Q. Yes, I understand, but how did you come to receive the three bottles, in the first place?

A. Oh, Mr. Elson inquired if we could and would conduct certain assays, explained the problem, and he made certain suggestions.

Q. Were these conducted at the Cedars of Lebanon Laboratories? A. Yes.

Q. Out on Fountain Avenue there?

A. Correct.

Q. By you and Dr. Sobel, is that right?

A. That is right.

Q. What part did you play as to Dr. [263] Sobel?

A. We each extracted both materials, side by side, that is, we were standing in front of a table and we each had a set of flasks in which we extracted, and compared the results.

Q. That is the duplication test we have heard something about, I mean you ran two at the same time? A. Two or three.

Q. You just ran the one?

A. No. We each ran three.

Q. Oh, you each ran three?

A. We reported the experiment three times on

(Testimony of Robert Ellis Hoyt.)

separate days and we each ran the experiment side by side.

Q. Do those results there give us all three or just one?

A. No. These are just a representative set. Actually, I might have pointed this out, I believe that the tests with the placebo were calculated against a different standard rating, since they were done on different days. You will see the readings of 525 and 420 here, and the lower figure, the denominator of each of the fractions refers to the standard reading made at the same time. You cannot compare readings made at one time with a standard reading made under different conditions. The standard reading must be made at the same time and in the same way as your test material.

Q. And you ran each of these tests in the same way, as you have described them here, is that right, in each step? A. Yes. [264]

Q. And have you described to us everything that you did? You told me now, in addition, that you compared the alleged alpha-estradiol with another sample of alleged alpha-estradiol, as a method of assuring yourself that this was alpha-estradiol, and you have told me now that you ran three of each, although this is said to be a report of one representative one, is that your testimony?

A. That is right.

Q. Do you have the work sheets on the others?

A. We don't have them with us.

Q. You just brought the one?

(Testimony of Robert Ellis Hoyt.)

A. That is right. These are in substantial agreement. Actually, to determine the error of a test like this, I suppose you would have to run 25 to 30. So, for determination, two would not have any more value than one, actually.

Q. Is there anything else that you did, any other test that you made in connection with these experiments that you testified to?

A. I don't recall any.

Q. Well, did you make the extraction, for example? A. Yes.

Q. The one on the top line, the first horizontal line? A. Yes. That is unextracted.

Q. What? A. That is unextracted. [265]

Q. No. Take the second one. A. Yes.

Q. Line 2, horizontal line 2. A. Yes.

Q. Did you then run a test back on the water, for example, to find out if the alpha-estradiol was left in there?

A. No. We weren't concerned with that. It wasn't our purpose——

Q. You didn't check back on any of this at any time, you just ran it through the U.S.P., but you made no check back on the excipient mass, for example? A. That is right.

Q. Or where you were using the alpha-estradiol with the excipients, you made no check back on any of the discarded solutions or materials, to determine what the situation was?

A. That is right. That didn't seem to be relevant.

(Testimony of Robert Ellis Hoyt.)

Q. In any event, you didn't do it?

A. Right.

Q. I believe you were testifying about this number 2, the line number 2, the horizontal line, and you stated that the loss of 27½ per cent was, in your opinion, attributable to the clinging of the alpha-estradiol or the active ingredient to the various beakers and glass containers that are used in the U.S.P. XIV process, is that correct?

A. Oh, that would be a contributing cause. I think it [266] is a negligible one, compared with the matter of differential solubilities which I mentioned a minute ago.

Q. You think that it is the solution now, that it remains back in the solution and does not come through, is that it?

A. That would be my feeling about this matter.

Q. We are speaking, now, of just the alpha-estradiol?

A. Yes, just the alpha-estradiol, without excipients present.

Q. You would lose 27½ per cent? A. Yes.

Q. Had you run any U.S.P. XIV's before you were instructed to do this one? A. No.

Q. That is all, the first you had?

A. That is all, the first U.S.P. Well, I was going to say this isn't a method I would select if I were interested in assaying estradiol.

Q. The method for extraction?

A. Yes, of estimating.

Q. It is not the method you would use?

(Testimony of Robert Ellis Hoyt.)

A. That is right. I would modify it considerably. But since we are dealing here with a method where the U.S.P. was used, we followed it.

Q. You received no tablets with instructions from the [267] defendants, or Woodard Laboratories here, on which you were asked to make this preferable extraction and measurement test? You have not measured or worked on any other tablets except those you have testified to here, is that correct?

A. That is right. That is absolutely right.

Q. This improved or better method that you have testified to, is that something that would be generally known to chemists or is it something that is known especially to you?

A. No, no. This type of extraction is commonplace. I think it would be preferable in a test run where you have a high degree of inert material and a small amount of active material, so that eliminates it to some extent.

Q. It is true, in analytical chemistry generally, if I understand it, all trained chemists do adapt their particular extraction procedures to the particular substances that they are dealing with, depending on the quantity and the amount of the substances they are after, and so on; adaptations are constantly made, are they not?

A. They are under certain circumstances. Under other circumstances, they are not. That is, if we are presumed to be bound by what is found in a particular method of assay, then we must conduct

(Testimony of Robert Ellis Hoyt.)

the assay under those methods in order to discuss them. [268]

* * *

Q. (By Mr. Klinger): In passing, you have already testified, in respect to this opinion which you hold about the amount that was left in solution, or the alleged amount which is supposed to adhere to other substances in a particular product, you made no investigation regarding that?

A. Other than to demonstrate that it occurred, but we did not find out why. [269]

Q. But your investigation doesn't establish, does it, that it adhered to the other substances?

A. No.

Q. You did not take those other substances, then, that were left and run those through any tests that you may have known about, to determine whether any alpha-estradiol had adhered to those substances? A. No.

Q. When you ran it through the solution alone, you have an alleged loss of 27½ per cent; is that right? A. Yes.

Q. And when you added the estradiol to a placebo which was supplied to you by Crest—incidentally, you made no analysis of that placebo as to its ingredients or anything of that kind?

A. Oh, no.

Q. ——you had a 50 per cent loss, is that right?

A. Yes.

Q. So the addition of the excipients in your

(Testimony of Robert Ellis Hoyt.)

opinion accounted for a 13½ per cent additional loss; is that it?

A. It is more than that, isn't it?

Q. 23½ per cent? A. 23, yes.

Q. 23½ per cent additional loss?

A. Yes. [270]

Q. After you added the excipients, that is it?

A. That is my conclusion.

Q. This is just to make sure that I understood you properly before: Is this the first time that you analyzed an alpha-estradiol tablet by this method?

A. Yes, that is correct.

Q. And by any other method?

A. By any other method. That is correct.

Mr. Klinger: No further questions.

Redirect Examination

By Mr. Elson:

Q. Mr. Klinger asked you if you checked back or assayed the residue, I believe, to determine whether there was any estradiol left. Do you understand what I mean?

A. Yes, I recall that.

Q. I don't know whether I stated substantially his question right, but I think that that is about it. That you didn't do so to see whether or not there was any other estradiol there. Why didn't you?

A. Well, it did not seem to us that this was part of the problem. The question that we were concerned with was merely, does the U.S.P. method

(Testimony of Robert Ellis Hoyt.)

accurately reveal the amount of estradiol present? To devise a new method is another problem, and it didn't seem to us that it was germane here.

Q. In other words, you were not engaged, nor were you [271] attempting, to devise a new method for the U.S.P. or anybody else's?

A. That is correct.

Q. You were attempting to determine whether the U.S.P. method was suitable, in your opinion, for the assay of the tablets that you had there at hand? A. Correct.

Q. Does the U.S.P. method compensate for any type of loss in the assay process?

A. Oh, yes, because in carrying out the U.S.P. method, the U.S.P. standard estradiol is extracted analogously to the product being tested, so that if the loss were only one of adherence and of solubles, the loss would be compensated for within the limits of error, which I suspect, although I don't know, would be sizable. But it would not account for any loss which would be peculiar to the product itself rather than to the procedure.

Q. Now, Dr. Hoyt, have you been called upon, at any time in the past, to run a U.S.P. assay on some product that you have never assayed before by that method?

A. No, I don't think I have. Most of the assays that I have done have been for clinical purposes and have not been restricted to the U.S.P. where the methods are slightly different.

Q. Let us take any other method of assay. Let

(Testimony of Robert Ellis Hoyt.)

us say [272] it is found in the literature or it is written down. Do you know of any reason why a competent, qualified chemist shouldn't be able to take that assay as it appears there and run it?

A. No. An assay which is described and which is made standard should be one which a competent person can do without more experience than his professional ability permits him to have, to begin with.

Mr. Elson: I think that is all.

Mr. Klinger: I just want to ask this one thing.

Recross-Examination

By Mr. Klinger:

Q. Do you report these low readings on these tablets that you analyzed? Do you believe that you extracted out the excipients in the tablet that you were analyzing?

A. Do you mean this matter of the mineral oil?

Q. Any of the matter that was in there. You don't know whether mineral oil was in these tablets?

A. I do, now. I didn't at the time we carried out the studies. No; we made no studies as to the presence or the disappearance of the excipient.

The only thing we considered was, do we get back all the estradiol that we add, and our conclusion was, we do not. Now, what else we might get and what we don't get, we did not consider, or why we didn't get it.

(Testimony of Robert Ellis Hoyt.)

Q. Well, if excipients were present, that would tend to [273] make the readings higher, would they not, generally speaking?

A. Oh, I don't think so. You recall, the U.S.P. method has a correction factor in the calculating there, which in itself is a rather moot factor.

This correction factor is intended to compensate for interfering substances, so you might actually have a higher galvanometer reading, but it would detract from your alpha-estradiol due to your 420 reading here.

Q. But if the excipients interfered with the reading, if the excipients were present together with the alpha-estradiol, wouldn't that give you a higher reading than if the same amount of estradiol were present without any excipients?

A. If you mean the reading on the galvanometer, yes. The same way a drop of ink in a tube would. But this false high value which you would get from known estradiol materials would be theoretical, but the formula of the U.S.P. method would be eliminated. But by taking the reading of 420 and subtracting one-half of the reading of the 420, you would have a reading of 220. That is a questionable procedure and I will agree that the correction factors are open to question, and the whole thing indicates that we have to deduce that this U.S.P. factor is far from established phenomena.

Mr. Klinger: That is all.

The Court: Doctor, is it your opinion, where we have [274] tablets such as are involved here, of 22

(Testimony of Robert Ellis Hoyt.)

micrograms of alpha-estradiol, that there is no known method by which may be determined the actual amount of alpha-estradiol in the tablet?

The Witness: Well, let me say that I think there are methods which can be applied to this and that an assay can be done. I would not say here exactly how to do it. I think that the dry extraction, rather than a wet extraction, would form the basis for such an assay. We demonstrated that we could recover more by another method than by the U.S.P. tolerance.

The Court: You did not make any analysis, so far as these particular tablets in question here are concerned? They were not submitted to you for an analysis?

The Witness: No, no, none.

The Court: I am referring to the ones with 22 micrograms in controversy here.

The Witness: No. At no time.

The Court: Had they been submitted to you, could you have made an analysis and determined the exact amount of alpha-estradiol in those tablets, using any method you cared to?

The Witness: I think it could be done—I think perhaps by biological assay it could be done, if not by the U.S.P. method. I am sure it could be done.

The Court: That is all. [275]

Redirect Examination

By Mr. Elson:

Q. What do you mean by "biological assay"?

A. You inject or plant some of this material

(Testimony of Robert Ellis Hoyt.)

into a bisexualized mouse and determine the response. This is a very sensitive test, but it also has a greater error with a dissolvable liquid.

Mr. Elson: That is all.

Mr. Klinger: That is all.

HARRY SOBEL

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Elson:

Q. Doctor, are you connected with any hospital or organization?

A. Yes. I am associated with the Cedars of Lebanon Hospital.

Q. Will you talk a little louder and a little slowly, please?

In what capacity?

A. I am the head of the department of biochemistry. [276]

Q. Tell us about your educational background, will you, please?

A. I received my B.A. in chemistry from Temple University in 1938. I received my M.S. in organic chemistry from the University of Pennsylvania in 1940.

I received my Ph.D. in biochemistry from McGill University in 1946.

(Testimony of Harry Sobel.)

Q. McGill is in Canada, is it not?

A. At Montreal, yes, sir.

Q. What college have you been connected with, hospitals or schools or anything of that sort?

A. I have been associated with Abbott Laboratories in the capacity of research assistant for two and a half years.

Q. Where was this?

A. Abbott Laboratories in Philadelphia, for two and a half years.

Following that, I was assistant chemist in charge of the clinical chemistry laboratory at the Jewish Hospital in Brooklyn.

Following that, I was lecturer in biochemistry at McGill University for three years, during which time I obtained my doctorate.

After that I had a Baird Foundation Fellowship at Cornell Medical College in New York. I spent a year there.

Following that, I was a research associate on the Donnor [277] Foundation Grant for a year and a half, at Beth Israel Hospital in New York.

And finally I have been at Cedars in this present capacity for almost three years.

Q. What are and have been your major interests in the professional field for some time past?

A. My major interests have been steroids and endocrinology and clinical chemistry.

Q. What are steroids?

A. Steroids refer to a group of compounds which go into the making of certain hormones.

(Testimony of Harry Sobel.)

They are direct or theoretical derivatives of a certain structural basis that we see in cholesterol. You probably have all heard of cholesterol, and there is some proof and indirect proof that many of the hormones, and the present one under discussion, are derived from cholesterol, and that is why they are called steroids as a group.

Q. Have you written any scientific papers during your career?

A. Yes, I have. Thirteen publications.

Q. Any of them having to do with the subject of steroids or estrogen or estradiol?

A. Directly or indirectly, I have eight.

Q. To make a long story short, you and Dr. Hoyt conducted these assays to which he testified, together, did you [278] not? A. Yes, sir.

Q. And you were here when he testified, were you? A. I was.

Q. And if you were asked the same questions as he was asked on direct examination, would your answers be substantially the same as his?

A. They would be substantially the same. I could expand on some of these things.

Q. Pardon me?

A. I could expand on some of these.

Q. All right. Do you have a copy of that chart?

A. Yes. I have it with me.

Q. All right. Now, will you point to the portions of that chart, of which you have a copy, Defendants' Exhibit I—we are referring to that now—will you point to the portion of that chart

(Testimony of Harry Sobel.)

which you feel you would like to expand on a little?

A. Let us take the fourth horizontal column.

Q. Pardon me?

A. The fourth horizontal column, labeled "Placebo."

Q. Yes.

A. I would like to start, first of all, and say something about the U.S.P. method for alpha-estradiol.

To begin with, in my opinion, the method should not be [279] labeled to detect alpha-estradiol, because, with the procedure as it is outlined, estrone and particularly estriol could also be determined and mistaken for alpha-estradiol.

Shall I pursue that?

Q. Yes.

A. In the U.S.P. procedure, it is labeled "Alpha-estradiol." Nevertheless, the method could also be mistaken against your colors with beta-estradiol and estrones, which are estrogens in their own right but have a somewhat lower potency than does alpha-estradiol. There is no provision for removing estrone or beta-estradiol.

There is a third possible contaminant, but the U.S.P. method does provide for that.

Q. What is that?

A. Estriol. Estriol is removed by this procedure. So that, to begin with, the labeling of this procedure actually as that of alpha-estradiol, I believe to be incorrect.

Q. Go ahead.

(Testimony of Harry Sobel.)

A. There are three sources of losses in determining alpha-estradiol as is given in the U.S.P. procedure.

To begin with, let us forget about the adding of the various constituents that go into the making of the tablet, the simple adding of a standard amount of alpha-estradiol and the final recovery of material.

What is done here is the following: The alpha-estradiol [280] is added in an aqueous phase containing acid. Then chloroform is added, and the separatory funnel is shaken. Chloroform is heavier than water and it sinks to the bottom.

There is going to be a small amount of loss due to seepage of chloroform through the stopcock at the bottom of the separatory funnel. In fact, for this reason I have always avoided the use of chloroform or any other solvent that falls to the bottom, but rather I prefer those solvents that rise to the top. There is a small loss there, and, while it may not be considerable, there is a loss.

Q. Can I stop you right there?

A. Certainly.

Q. In assaying a product which has only 20 or 22 micrograms in it, would a small loss such as that become a more important factor than if you were assaying a larger quantity of estradiol?

A. The percentage of loss would be the same, the percentage of total loss would be the same.

Q. How about the effect on the assay, would the possibility of error be greater or be less?

(Testimony of Harry Sobel.)

A. No. The percentage of loss to the assay would be the same.

Q. Go ahead.

A. There is one source of loss already.

Secondly, as Dr. Hoyt pointed out, a small [281] amount of material will be retained in the aqueous phase. In fact, that is the basis for extraction. If you have a substance you are partitioning between two phases, like water and chloroform, a certain partition ratio will be set up. So let us assume 85 per cent will appear in one phase and 15 per cent in the other phase. This ratio will be maintained so that there will always be something remaining behind. I can't tell you what it would be in the case of alpha-estradiol and in the partition between acid, water, and chloroform, but there would be a small amount retained. So there is another source of loss.

Thirdly, in one stage of the game, you extract an alkaline solution. Now, here the column is subject to very rapid destruction. Alkaline solutions of alpha-estradiol are very easily oxidized and, in fact, if they are followed for any length of time, they will be destroyed. So there is another loss.

Ultraviolet rays will attach alpha-estradiol, dissolve it and cause additional destruction of it.

So that it is not at all surprising if only 72.5 per cent can be recovered in the normal set of events, when you carry through a known solution of alpha-estradiol, through the U.S.P. procedure. In fact,

(Testimony of Harry Sobel.)

considering all the factors involved, it is a rather satisfactory recovery.

Now, under the U.S.P. procedure, I know that there is a [282] loss in carrying this out, because they use, as a standard, a standard solution which is carried through this identical procedure. If there were no losses involved, if the U.S.P. procedure did not acknowledge a loss, they would not require that the standard solution be carried through this procedure; they would say at the end to directly take 20 micrograms and develop your color with that. Instead, they tell you to add 20 micrograms and run it through the identical procedure. And that is your first source of error, but this source of error is compensated for by the U.S.P. procedure. However, there are two other sources of error that are not compensated for by the U.S.P. procedure.

To begin with, going back to our original standard, when you shake this solution of water and chloroform and allow it to sit for 30 seconds or more, there will be a clear separation of water and chloroform. There will be no interphase that will interfere with the extraction.

On the other hand, if you do the same thing with your tablet, an entirely different sort of thing happens. You see the aqueous phase. You see the chloroform phase. But you see a large amount of emulsion that does not occur in the case of your standard. There is emulsion.

Now, that was produced by the presence of solid particles which did not come off with the water, which went into the making of the tablet. [283]

(Testimony of Harry Sobel.)

In this case, I believe that starch and talc would probably be the main culprits in the production of the emulsion in the soluble, and in the presence of starch and talc you could expect an emulsion to form.

Now, that is a very common thing when you are working with extracting runs. If ever you have any particulate matter present, you will invariably get emulsion.

So that this emulsion does not occur when the standard solution is being run through the procedure.

Now, what about this emulsion? Why should it cause a loss? It is rather surprising, but even though four extractions are called for in the U.S.P. procedure, it is still very likely that a certain amount of material is entrained in the emulsion.

Now, I have evidence that this can be an entirely different sort of thing, in some experimental work I was running, trying to extract cholesterol from serum, after a certain treatment, by shaking with chloroform for half an hour in a shaking machine, which is a much longer time than you would shake even in the four extractions with chloroform with this tablet, and in spite of that shaking I learned that, in the emulsion that was formed, a considerable amount of cholesterol remained and was retained.

So that I believe that the emulsion seriously interferes with the extraction of alpha-estradiol. I cannot, however, [284] tell you how much is re-

(Testimony of Harry Sobel.)

tained by virtue of the emulsion, but because the separation is not clear and sharp, because the emulsion is present, a certain amount of loss I believe will occur.

Next, I have just pointed out that this tablet contains starch. This was very obvious to us when we performed the tests, even before we were told there was starch in it. You take the tablet and add a drop of iodine to it and you get a color, and this is a test for starch.

Now, immediately the thought occurs, then, that starch itself may absorb into itself some of the material and not permit it to be extracted with the chloroform. Now, why do we think that? To begin with, there is a phenomenon, that is, an experimental technique that is very well known in biochemistry, known as chromophotography. To give you a very simple picture, I might state one of the early experiments that was done with this particular technique.

Tswett, many years ago, would take extracts of carrot, let us say, with petroleum ether, and he would pass them through columns, in his early experiments, of calcium carbonate or starch, or mixtures of both.

I point out that starch was used, because it comes into this, and on passing the solution through, he got various demonstrations of absorption of the yellow color that you see in the carrot. This technique was ultimately developed, and [285] we call it chromophotography today and we use it to help

(Testimony of Harry Sobel.)

separate certain hormones and certain products we are trying to separate.

Starch has a certain ability to absorb certain things.

Q. You say "absorb certain things"?

A. I cannot specifically say what you may do with alpha-estradiol, but it does have this very property. The reason why starch is not used for separations in the case of hormones is that today there are better materials that can be used for absorption, so that the steroid chemist routinely will use that rather than starch. Nevertheless, even though I cannot say that I have the information pertaining to alpha-estradiol itself, when coming into contact with starch, I definitely feel that alpha-estradiol could be absorbed to the starch and be retained and thus not be available for extraction.

Q. When you say you definitely feel, you mean that is your opinion?

A. That is my opinion, that there could be a certain loss in that sense.

Furthermore, in the initial step in the procedure, the water suspension is acidified, treated with acid, and this theoretically would enhance its absorptive capacity, that is, the absorptive capacity of starch would be enhanced by putting it in the presence of acid. [286]

There are certain analogous situations where an absorbent is deliberately acidified to increase its absorbing powers. For example, during pregnancy tests, as we test them in the laboratory, we delib-

(Testimony of Harry Sobel.)

erately acidify urine and then it becomes absorbed by the absorbent that we use. If we want to take it off, we treat it with alkali, but if we want it to stay on, we treat it in the presence of acid.

So, with all this evidence, it is my opinion that some alpha-estradiol is retained by the starch.

So that, in summation, there are two sources of loss of alpha-estradiol, in my opinion, which are not compensated for in the U.S.P. method. There are three sources of loss all together, one of which is compensated for by the U.S.P. method, and the other two sources of loss are not compensated for by the U.S.P. method.

Q. What are they?

A. Well, in summary, the possibility—the presence of the emulsion and the presence of starch which could absorb some of the alpha-estradiol.

Q. Do you mean by that, that the two methods that are not compensated for are the emulsion and the absorption?

A. Those two are not compensated for by the U.S.P. method. That is correct.

I might add that I cannot tell you the degree of loss that would take place because of that, but the U.S.P. method [287] does say that in general the tablets contain between 100 and 200 gamma of material. Assuming that all tablets weigh about the same, for convenience in swallowing, that a certain loss would take place in extracting with a tablet containing 200 gamma of estradiol, if it were just in the order of five or six gamma lost, it would

(Testimony of Harry Sobel.)

play no role in deterring the use of this procedure. But, in the case of a tablet which contains 23 gamma, a loss of six gamma just by virtue of emulsion and by virtue of absorption becomes appreciable.

Q. One other question. In your opinion, is it possible for a tablet, such as the one involved here, to contain a labeled potency of 22 micrograms and still, on a U.S.P. assay, show materially less than that? A. I believe it is possible.

Q. For the reasons that you have mentioned?

A. That is so.

Mr. Elson: I have no further questions.

Cross-Examination

By Mr. Klinger:

Q. Dr. Sobel, I will just take a few moments. Now, as to these uncompensated-for possibilities of loss of alpha-estradiol, I take it from your testimony on direct that you are not prepared to say that alpha-estradiol is actually lost in the emulsion or that alpha-estradiol is actually absorbed by any starch? Alpha-estradiol, that is what we are [288] talking about.

A. Yes. I cannot support this with any experimental evidence; simply my opinion based upon my experience with these matters.

Q. It is your opinion on the emulsion. You referred to some cholesterol work that you have done?

A. That is right.

(Testimony of Harry Sobel.)

Q. Your opinion with reference to the absorption by starch is based on certain other work that you have done? A. That is right.

Q. But you have conducted no work, either with these tablets that were sent to you or with any other alpha-estradiol, to determine whether any is actually lost at those places?

A. I cannot tell you that any is lost at those places. I can tell you, though, in the over-all, that, as Dr. Hoyt has said, in the situation where we added a known amount of alpha-estradiol to what we call our placebo tablet, that we did not get back what we should have, even if compensation were made for the loss with the U.S.P. standard, with the standard carried through according to the U.S.P. procedure.

Q. You heard Dr. Hoyt testify and your answers would be the same as he gave to me, with respect to the receipt of the tablets and how they were received? A. That is so. [289]

Q. And the ratio of the alpha-estradiol or alleged alpha-estradiol and how you tested the alpha-estradiol by comparing it with some other alpha-estradiol that you received from someone else. Your answers would all be the same as to that?

A. They would be all identical, exactly.

Q. And they would also be the same, that you did not receive any other tablets from the defendants in this case, or from their attorney, for analysis?

A. The only tablets that we had were put in two

(Testimony of Harry Sobel.)

bottles, one of which was labeled "2571-B" and the other labeled "Placebo," and there were no other tablets involved.

Q. Those were the only ones? A. Yes.

Q. I was just interested to hear you say that the ultraviolet radiation might be a source of destroying, although you claim this is compensated for, a possibility of loss. Nevertheless, you do conduct your experiments in the presence of ultraviolet rays; is that right, or do you not?

A. There is always some stray ultraviolet light around. For example, that is one of the reasons why I am sure you must carry your standard solution through the same thing. There are some laboratories where there will be more sunlight going through, and there will be others where there will be less light coming through. There are laboratories where they [290] will have fluorescent lighting, and this is going to influence your result.

Q. You didn't mean there was anything in the process that would destroy anything?

A. No, no. Simply the ultraviolet ray.

Q. Nothing in the process?

A. Nothing in the process.

Q. Regarding the destruction of alpha-estradiol by alkaline solution, have you done work on this to determine that an alkaline solution will actually destroy alpha-estradiol?

A. As a matter of fact, there is sufficient evidence in the literature, but in any treatment where I have used estrogens in any of my work, it was

(Testimony of Harry Sobel.)

asbolutely imperative to avoid contact with alkali for any length of time. Furthermore, in doing routine analytical work with estrogens, even urine becomes alkaline, you stand a great chance of losing a lot of your material, and it is important to avoid this urine from becoming alkaline. In this routine procedure, for example, when the urine is collecting, as it must be, for 24 hours, it is common practice to add some acid to make certain that it does not become alkaline, and when the patient is given the bottle for a collection of urine for estrogen determination, almost invariably we give him some acid to add to it. [291]

Q. And you would say, on the basis of that, that the alkaline solution that is used in connection with the U.S.P. XIV, that that is the basis for your opinion that the alkaline solution there could destroy some of the alpha-estradiol?

A. No, that is not the basis for it. I am not saying that because they tell you to add acid. I am saying this simply because there is evidence in the literature that estrogens, by virtue of being phenolic substances, are oxidized in alkaline solution.

Q. There is evidence in the literature that you can refer to, that the alkaline solution destroys alpha-estradiol in that sense?

A. I couldn't immediately cite that literature, no.

Mr. Klinger: I think that is all.

(Testimony of Harry Sobel.)

Redirect Examination

By Mr. Elson:

Q. Just one more question: Dr. Sobel, you are able to obtain estradiol, U.S.P.; you can obtain the U.S.P. standard from the U.S.P. board, or whatever it is, can't you?

A. I am sorry. I don't understand.

Q. In other words, if you want to get some U.S.P., I think they call it reference standard, don't they, you can get it from the U.S.P. board itself?

A. Well, actually, when you speak of estradiol U.S.P., it is really estradiol of U.S.P. purity; in other words, when [292] you have a container marked "Estradiol U.S.P.," is doesn't necessarily mean that this is a standard that they have at Washington. It simply means that it is of U.S.P. purity.

As a matter of fact, in all probability, if I wanted a standard I would have access to a standard that was purer than the U.S.P. standard, because there are individuals——

Q. What you got was labeled "U.S.P."?

A. "Alpha-estradiol U.S.P.," that is correct.

Mr. Elson: That is all.

(Witness excused.)

(Whereupon the defendants rested their case in chief.)

Mr. Elson: I move for a judgment of acquittal.

Mr. Klinger: I have some rebuttal yet. I think you can make that motion a little bit later.

The Court: We will take a recess.

(Recess.)

(And thereupon the plaintiff, to further maintain the issues on its behalf, offered and introduced the following evidence, in rebuttal:)

Mr. Klinger: I will recall Mr. Carol.

JONAS CAROL

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further, in rebuttal, as follows: [293]

Direct Examination

By Mr. Klinger:

Q. Mr. Carol, you are the Jonas Carol who testified here yesterday in this cause? A. I am.

Q. Mr. Carol, let me review again very briefly your experience in connection with assays of alpha-estradiol.

How many assays do you estimate you have made of alpha-estradiol tablets, oils, solutions, and can you tell us on what else, in the period of time that you have been a professional chemist and the time you have been at the Food and Drug Administration?

A. Well, as I said yesterday, at least a thousand.

Q. Now, you testified yesterday about the part that you and others associated with you at the Food

(Testimony of Jonas Carol.)

and Drug Administration played in the development of U.S.P. XIV procedure for analyzing, for assaying estradiol, alpha-estradiol tablets; is that right? A. Yes.

Q. By the way, right at the outset, when, if you know, was the first time that estradiol tablets were recognized in any official compendium?

A. In this country, you mean?

Q. Yes, in the United States, of course.

A. That was November, 1950. [294]

Q. When it was recognized in what official compendium?

A. In the United States Pharmacopoeia, Fourteenth Revision.

Q. And when was the first time that any assay for alpha-estradiol in tablet form was recognized by any official compendium?

A. In the same book, November, 1950.

Q. Now, with respect to that process, that procedure, can you tell us in a general way the basis for that procedure, the experimental and scientific basis for the development and preparation of that procedure?

* * *

A. Yes. The basic principles upon which the procedure was devised have been well known for many years, in the case of extraction principles.

Q. Will you speak loud? [295]

A. Yes. In the case of extraction principles and the separation principles, in parts have been known for many years.

(Testimony of Jonas Carol.)

Estradiol, like all the other estrogenic hormones, is a phenol, and methods of extraction of phenols have been known for a long time.

In 1920, there was a book by Fuller, "The Chemical Analysis of Drugs and Medicines," that describes how phenols may be extracted and separated from acids, and the principles that we use are essentially those as described here.

Now, the colorimetric procedure, the so-called "modified Kober method," was first discovered in about 1933, not long after estradiol was discovered, itself. That method has been constantly modified, improved. In fact, in my laboratory we have made two such improvements, and the last one being published by Dr. Haenni, who worked in our group, is the actual basis for the final colorimetric determination.

Q. Had the procedure, prior to its publication, been submitted for collaborated study?

A. It had. And there is a journal of the Association of Official Agricultural Chemists, of which I am a referee on spectrophometric methods for drugs, and the members studied the actual determination of alpha-estradiol colorimetrically. That is a group of associate referees. Each determined alpha-estradiol from their own samples which were submitted [296] to them, and the results were reported at the fall meeting and subsequently published in the J.O.A.O.A.C. That is the Journal of the Official Agricultural Chemists.

The actual U.S.P. method was submitted by us

(Testimony of Jonas Carol.)

to the U.S.P. and circulated in mimeographed form to the various members of the committee that were active on those types of drugs, and, after being voted upon, it was accepted by the U.S.P. as an official method.

Now, a large number of people have corresponded with me on this method and others, and in fact quite a large number of them have come down and actually worked in my laboratory on this and similar methods.

Q. Now, there has been some talk in the case about the size of a particular tablet or the amount of alpha-estradiol that obtains, as to whether that creates any difficulty, or whether the U.S.P. procedure is applicable to the analysis of a tablet of that kind. Now, will you tell us, please, whether the procedure known as U.S.P. XIV restricts the tablet size in any way or is or is not applicable to tablets containing very small potencies as well as large?

A. Well, in the first place, the U.S.P. method says nothing of the actual tablet strength or the strength of tablets that may be analyzed by this procedure. It merely states that a weighed number of tablets containing a total of 200 micrograms of estradiol be used in the assay. [297]

Now, it is true that the U.S.P. at the end tells what is the usual dose of estradiol in tablets, but that doesn't mean that there aren't dosages where the strength will be low. There are thousands upon the market.

Q. Have you in your work analyzed, according

(Testimony of Jonas Carol.)

to the U.S.P., other preparations—other tablets containing even less than 22 micrograms per tablet of alpha-estradiol?

A. Yes, I have, although not very many, but I have analyzed a number containing approximately that amount.

Q. And under the U.S.P. method?

A. And using the U.S.P. method. Those are commercial preparations.

Q. And with what result?

A. They were all within the U.S.P. requirements, that is, that they contained within 90 to 115 per cent of the declared amount.

Q. Now, as to the removal of various excipients from a particular tablet under the U.S.P. procedure, particularly ones that there has been some discussion about in this case, let us take all of those that are said to appear in the tablet which is involved in the "Information." Take the constituent acacia, where would that be removed?

A. Acacia would remain back in the first water suspension.

Q. So it would be discarded? [298]

A. That is right.

Q. Right at the first water suspension, and why?

A. Because acacia is soluble in water, or at least it forms a jell in water, and it is entirely insoluble in chloroform, so it would never be extracted to any degree at all in the chloroform.

Q. How about sugar, at what step or stage?

A. Sugar is quite soluble in water, and it would remain back in the water solution.

(Testimony of Jonas Carol.)

Q. And starch?

A. Starch is insoluble in water and insoluble in chloroform, so it would remain suspended in the water.

Q. In the first step?

A. In the first phase, yes.

Q. And the talc?

A. Talc is quite insoluble and it would remain back suspended in the water.

Q. And the lactrose?

A. Lactrose being sugar, being very soluble in water, would remain in the water.

Q. Sterotex?

A. Sterotex would dissolve in the chloroform, and then, when the chloroform is evaporated and diluted with petroleum ether, the Sterotex would remain in the petroleum ether solution, when it is extracted by sodium hydroxide. Now, if [299] a little bit were carried mechanically through, it would be re-extracted in the carbon tetrachloride wash, which is the next step, it would never get past that.

Q. And mineral oil?

A. Mineral oil would act in the same way as the Sterotex.

Q. This testimony that you have given, is that based merely on your theoretical opinion from knowing the chemical nature of these substances, or is it based on actual experimental work done with alpha-estradiol?

A. It is based on work done with alpha-estradiol

(Testimony of Jonas Carol.)

and with materials of this type taken either together or each by itself.

Q. And by actual experimental work how do you check back to determine whether they are taken out at these various steps? What do you do to determine that?

A. Well, now, in case of all those that remain back in the water, we would extract with chloroform, evaporate the chloroform to dryness, and observe that there was nothing left, no weighable amount of material left in the residue.

In the case of mineral oil and the Sterotex, after extraction with sodium hydroxide, acidification, and extracting with benzene, we would evaporate the benzene to dryness and observe that there is nothing left there.

And also in this case we could carry the whole analysis [300] through to the final colorimetric determination and see if we obtain any observable color in the final step which matched with the standard alpha-estradiol.

Q. In other words, you recheck and go through the same process, and then discard the material?

A. That is right.

Q. To determine whether there is any estradiol or any alpha-estradiol which remained back, is that correct?

A. Not only of these materials but quite a few others, too.

Q. Yes. And this has been done by you and under your supervision, with alpha-estradiol is that correct?

(Testimony of Jonas Carol.)

A. With alpha-estradiol and alpha-estradiol preparations.

Q. In fact, there has been testimony in this case of work of that type done on tablets of the type involved in this case, is that right?

A. That is right.

Q. With regard to something that came up just a few moments ago, I think Dr. Sobel spoke about that the U.S.P. test did not say anything about beta-estradiol or estrones, that it made no allowance for those, and that they sometimes appeared together with alpha-estradiol. Now, first, if that were true and the U.S.P. procedure made no allowance for it and it continued on through with the alpha-estradiol, what [301] reading would be obtained, a higher or a lower reading than you would otherwise get? A. Higher. If I may explain——

Q. Yes.

A. All the estrogenic hormones will produce a color with this final Kober's reagent, varying somewhat in intensity but with the same hue as that obtained by alpha-estradiol, and in this procedure, if any of these other estrogens were present, they would give you a higher result.

* * *

Q. Does the U.S.P. provide for the procedure in connection with beta-estradiol?

A. Yes, it does. In the preceding monograph, which deals with the estradiol itself, with the crystalline estradiol, there are a series of tests that are specified to prove that it is pure estradiol.

(Testimony of Jonas Carol.)

Now, the estradiol tablets which follow must use material of that purity in their manufacture to be estradiol tablets U.S.P. That is the meaning. That is the reason for this first monograph.

Q. Incidentally, on your direct [302] examination earlier, you testified that you performed or followed a process of measurement or estimation known as the infrared method, is that correct?

A. Yes.

Q. Now, by the infrared method which you used on all of the shipments involved in this case, does the infrared method detect immediately the presence of any excipients which may be together with alpha-estradiol being measured?

A. If any excipients would get into the final measuring solution, it would surely detect them, because the absorption curve you get is a tracing, on a continuous tracing, has a definite shape for each compound, and if you run pure estradiol through the infrared spectrophotometer, or run the absorption of it, you get a curve with a series of peaks, each peak occurring at exactly a definite wave length, and never varying, and the shape and size of those peaks are always the same. If there is any other material present, it will immediately modify the shape of that curve, and you just have to look at it and compare it with the pure estradiol and tell immediately that it is there. So, if the curve you get for the final determination is not exactly like that of pure estradiol itself, we immediately know that there has been some impurity carried along in your analysis.

(Testimony of Jonas Carol.)

In all these cases, the curves that we got were those of pure estradiol, alpha-estradiol. [303]

Q. With respect to some other items that Dr. Sobel mentioned, and I think you heard his testimony, that in his opinion, although he had not made any tests to determine that, there could be some loss in the emulsion, what have you to say on that, based on your actual experience?

A. In any analysis, if a particular emulsion was formed in an extraction and nothing was done about it, you naturally would have loss in the emulsion. But any chemist with the least bit of experience knows immediately, when he has an emulsion, that something else has to be done—either leave it stand until the emulsion breaks, or place the material in a centrifuge, which produces a very increased gravitational field and will break the emulsion. That is a step that is taken for granted by people who work in a field like this. If an emulsion forms, you would do one of two things. Emulsions are very common in drug analysis.

Q. Not only in drug analysis of alpha-estradiol, I take it? A. That is right.

Q. And, further, what evidence is there pro and con on the question of whether alpha-estradiol will be destroyed by an alkaline solution, such as Dr. Sobel thought possible?

A. Alpha-estradiol of the purity used in these tablets would be quite stable for a rather length of time in alkaline solution. We frequently heat estradiol in dilute alkali for [304] periods of half

(Testimony of Jonas Carol.)

an hour or more, without any loss, at the heat or temperature of a steam bath, or a hundred degrees Centigrade.

Q. And a loss item relating to the absorption, I guess it is, of alpha-estradiol to starch?

A. Alpha-estradiol in chloroform solution, and that is essentially what you have when you shake the mixtures, with the tablets suspended in water, with chloroform, would be very weakly absorbed on starch. A small amount would be absorbed on starch. But, when you made the second extraction, the chloroform would take it essentially off, and when you made the third extraction there would be only a very tiny amount left. On the fourth extraction, it would be so small that it would not be measurable.

It is true that these estrogens will adsorb on many things, but there are ways of taking them off and we have investigated these ways. We used them in our procedures.

Q. What about the amount that sticks to the glass beakers and is lost in that way, about which so much has been said in this case?

A. I have never had any stick to glass beakers that I knew of, but we have gone through these procedures, using pure alpha-estradiol, and obtained from 98 to 100 per cent recovery every time.

The amount that would stick to the beakers would be so [305] small that it would be difficult to measure it.

(Testimony of Jonas Carol.)

There is another point I would like to bring out, on this matter of ultraviolet light.

Q. Yes. I was coming to that. The destruction or the possible destruction by ultraviolet light, or stray rays of sunlight, I guess it was?

A. We have carried tests on the stability of preparations of this type in which we have allowed solutions of estradiol and suspensions of estradiol to stand right in the light on an ordinary bench that you would have in a laboratory, for periods of several years, and analyzed them periodically, and those that have been indoors have shown no reduction in the content of estradiol. If you allowed it to stand in bright light, sunlight, like outdoors, in several weeks there would be some loss. But, no chemist, in the first place, conducts an extraction standing in the sunlight, and if there was a beam of sunlight shining through, it would be a matter of five to ten minutes. The loss there wouldn't be measurable.

Q. I think we have covered all those items that Dr. Sobel referred to, and let me ask you one further question about this Standard Reference U.S.P. material. What is its purpose and what does it mean?

A. The U.S.P. Reference Standards, and there are quite a few of them for different drugs and materials—in the case [306] of estradiol, it is estradiol that the U.S.P. has obtained and tested thoroughly. It is sent to a number of collaborators to test to show that it is, in effect, alpha-estradiol

(Testimony of Jonas Carol.)

of high purity. Now, they then take and subdivide that into small units and sell it to anyone engaged in this work, who writes to the U.S.P. at Philadelphia and requests a sample, so that the person will know that they are using a very high grade of estradiol as their reference standard, one of proven purity. It comes sealed, it has a U.S.P. seal on it and the name of the product.

Q. It is used, then, to assure as far as possible the accuracy of the standard against which you are testing a particular product by a U.S.P. procedure?

A. That is right.

Mr. Klinger: Just one moment, your Honor.

No further questions.

Cross-Examination

By Mr. Elson:

Q. Mr. Carol, don't you believe that a competent chemist should be able to take the U.S.P. XIV, turn to page 227, which has to do with estradiol tablets, and run an assay of those tablets in the manner that is prescribed there?

A. That is right. I think he should.

Q. It would not require a chemist who had—we will say he wouldn't have to have had assay experience with a [307] hundred or a thousand assays, in order to run the assay method there, would he? A. No.

Q. As a matter of fact, one of the prime purposes of the United States Pharmacopoeia, where an assay procedure appears, is to set forth a method

(Testimony of Jonas Carol.)

of assay which is a practical one and one within the reach of a qualified chemist?

A. A qualified chemist experienced in analytical chemistry.

Q. That is true. A. That is right.

Q. Certainly. And when I am talking about a qualified chemist I mean who is qualified in analytical chemistry, he should be able to run it without trouble?

A. If you assume that he is a qualified chemist, experience in analytical chemistry.

Q. Well, that is what I am assuming.

A. Yes.

Q. I am not assuming that he is not qualified.

Now, you have given us quite a bit of testimony about this U.S.P. method and your method about which it was devised, and so on. In your opinion, could there be any improvement for that method of alpha-estradiol?

A. I have never seen any method that couldn't be improved. [308]

Q. Well, is it your testimony, then, that you don't say that that method could not be improved?

A. I only say that this is the best possible that we know how to use for estradiol, that it can be used with relatively simple equipment.

Q. In the assay that you conducted of the tablets that are involved in this lawsuit, did you follow precisely the U.S.P. method?

A. In my analysis, no.

Q. What method did you use?

(Testimony of Jonas Carol.)

A. I used the infrared procedure.

Q. The infrared procedure is the procedure—in other words, you would use that at the end of the assay, would you? A. The infrared, yes.

Q. In using an infrared spectrophotometer, is that correct? A. That is correct.

Q. You would still start out your assay procedure as the U.S.P. provides, with the weighing and the extraction method, and so on, wouldn't you?

A. A similar process.

Q. Yes, and then you would finally come down to the end where you were going to measure the density of the light, or whatever you do, and it is at that point that you would use your [309] infrared? A. That is true.

Q. Which one of you gentlemen used the U.S.P. method? A. Dr. Banes.

Q. That was under your supervision?

A. Under my supervision.

Q. Did Dr. Banes follow precisely the U.S.P. method as appears in U.S.P. XIV?

A. He did.

Q. With no deviations of any kind?

A. There were some samples on which he did that, that he deviated.

Q. Were there any samples from which he made no deviation at all? A. There were.

Q. In extraction or otherwise?

A. That is right.

Q. And was it his testimony that he came up with comparable results in both cases?

(Testimony of Jonas Carol.)

A. That is right.

Q. How many runs were made on the U.S.P. method here?

A. On these samples in question?

Q. Yes.

A. I would have to refer to the records, but I believe eight in all.

Q. And did the results on those runs vary? [310]

A. There was a slight variation, yes.

Q. By "slight," what do you mean?

A. Without remembering the exact results, in some cases we would get .005 and .006 milligrams, on two different analyses. On others we would get .014 or .015 and .016 variation. The greatest was 20 micrograms in any results reported.

Q. .005 would be 5 micrograms?

A. .005 would be 5 micrograms.

Q. And .006 would be 6? A. Yes.

Q .014 would be 14? A. That is right.

Q. And .015 would be 15, and so on?

A. That is right.

Q. If a certain amount of estradiol were adsorbed in the initial process here, I understand it to be your opinion that by successive extractions the amount can be extracted, or the estradiol can be extracted? A. That is true.

Q. Do you know that to be a fact, or is that your opinion?

A. No. I know that to be a fact.

Q. From the experiments you were just talking about? A. From the experiments, yes. [311]

(Testimony of Jonas Carol.)

Q. Now, if an essay method is run several times by competent, qualified chemists and duplications of results are not obtained, would you question the suitability of the method of assay for the particular product involved?

A. That is asking me to figure out what someone else is doing.

Q. No, no. We start out with this, that they are competent and qualified chemists, men that are learned in the field of analytical chemistry as well?

A. If you make an assumption——

Q. That is right.

A. ——that they made no mistakes in any manipulation and they couldn't get duplicate results, then it means that the method may be faulty or that their source, their two samples with which they start, did not have the same composition. But I would have to stand and watch the man do the analysis before I could say where the fault lay.

Q. You say if they made no mistakes. Of course, you don't mean by that, that a competent, qualified analytical chemist will not in the course of an assay make a mistake at times and not be aware of it?

A. Anyone can make a mistake, understand.

Q. And that has happened with you, too, hasn't it? A. So has it happened with many.

Q. At the end of the assay, what method of reading is [312] contemplated and provided for by the U.S.P. method?

A. It is the spectrophotometric method.

Q. What is that?

(Testimony of Jonas Carol.)

A. It is the reading, using a spectrophotometer.

Q. Well, does it say so?

A. I will see just what it says. It says, "Measure the absorbencies of the solutions of the sample and of the Reference Standard"——

Q. Where are you reading from?

A. From page 228.

Q. Yes.

A. You will notice this calculation about a third of the way down on the page.

Q. Yes.

A. Just above that there is a paragraph commencing with "The quantity, in micrograms, * * *" Now, if you will go to the sentence right above that.

Q. Yes. I see.

A. "Measure the absorbencies of the solutions of the sample and of the Reference Standard relative to the blank at 525 millimicrons and at 420 millimicrons,"—now, they are merely saying to that type of person that it is necessary to measure the solution under some kind of a colorimetric measuring device. They are the type that can distinguish and make readings of 525 millimicrons and 420 millimicrons. There are [313] other, different colorimetric and spectrophotometric determination methods by which they can do that.

Q. However, that makes no reference to infrared spectrophotometry for this purpose?

A. None whatever.

Q. In connection with the assays that you made here in this case, were there handed to you any

(Testimony of Jonas Carol.)

estradiol tablets manufactured for or distributed by Woodard Laboratories purporting to contain 110 micrograms?

A. As far as I can remember, I have analyzed none of those.

Q. Or any other handed to you for analysis?

A. I can't recall ever doing any.

Q. If they were handed to you, then, or at about the time these in question were, do you believe you would remember it?

A. If they had handed them to me, I am sure I would have. I think we can be quite certain that I didn't at any time.

Q. Do you know whether or not such tablets were obtained by anyone in your department or in your organization for such an analysis?

A. They weren't, because they would come to me first.

Q. Are these analyses conducted at some of the branch or district stations? [314]

A. They are.

Q. Do you know whether any such analysis of the 110-microgram product has been made at any of the branch stations?

A. I could not say positively, but I would be fairly certain in saying no.

Mr. Elson: I have no further questions.

(Testimony of Jonas Carol.)

Redirect Examination

By Mr. Klinger:

Q. Why did you use the infrared instead of the colorimetric for your particular measurement on the tests that you ran?

A. Because, as I testified yesterday, the infrared method will show you the exact amount of alpha-estradiol, or whatever material is present, and it will show you definitely that you have alpha-estradiol or the material present. It is both qualitative and quantitative, at the same time, and it shows you beyond any doubt that you have that material.

Q. The U.S.P. not mentioning any type of measurement but merely describing what is to be measured, is there anything official about measuring by a spectrophotometer?

A. There is a chapter in the back of the U.S.P. which describes spectrophotometric measurements and tells how they are to be made. Naturally it does not tell the exact make of spectrophotometer to be used.

Q. The other men in your organization that analyzed [315] this, Dr. Haenni and Dr. Banes, they followed the U.S.P. method?

A. That is right.

Q. And they measured it by the method in here, using a Beckman quartz spectrophotometer.

Q. So you had a check on your other?

A. Yes. Another reason we like to use infrared is because we like to use two different procedures entirely, if possible, when analyzing a sample.

(Testimony of Jonas Carol.)

Mr. Klinger: No further questions.

Recross-Examination

By Mr. Elson:

Q. Mr. Carol, you stated, I believe, in substance during my questioning of you, that you had conducted some experiments to determine your ability to extract estradiol from excipients into which they had been absorbed. Am I substantially correct?

A. Well, let us put it this way—yes, yes.

Q. Were any of those experiments with a tablet containing substantially the same excipients as we have here, with approximately 22 micrograms of estradiol?

A. We had just such an experiment, in which, for the analysis of these tablets, after the extraction of the estradiol, we again added estradiol to that tablet mixture and re-extracted. [316]

Q. Let me see if I get this correct. You made one run, or whatever you call it, and made an extraction? A. That is right.

Q. And then you had a certain residue?

A. Yes.

Q. Then, as I understand, you added some estradiol to that residue? A. Yes.

Q. And made an extraction?

A. And made an extraction.

Q. And you obtained what?

A. From memory, we obtained either 97 or 98 per cent of the amount that we put on.

Q. Well, what amount did you put in?

(Testimony of Jonas Carol.)

A. We put on 22 micrograms, or the equivalent. Wait. I am sorry. We would put on what would be 10 times 22 micrograms, or 220 micrograms.

Mr. Elson: That is all.

Mr. Klinger: No further rebuttal, your Honor. The Government rests. [317]

* * *

(Government counsel thereupon made his opening argument.)

* * *

The Court: Mr. Elson, in making your argument I wish you would answer a question in the mind of the court.

Mr. Elson: All right, sir.

The Court: The defendants are charged here with shipping and misbranding of these tablets. They were branded to contain 22 micrograms of alpha-estradiol. The question in the mind of the court is the absence of any testimony on the part of the defendants as to assays made by the defendants to determine the amount of alpha-estradiol in these tablets.

Mr. Elson: Well, your Honor, I will take that up right at the start.

Argument on Behalf of the Defendants

By Mr. Elson:

As the evidence has shown, Mr. Klinger offered for identification, but nevertheless later offered it into evidence, there was a letter that gives the whole history of what these people did after they had

received the notice from the Food and Drug Administration charging that the shipment [324] was below potency. Now, mind you, the first notice was in May of 1950. That was with regard to two of the lot numbers.

And the second notice was in June or July of 1950, and that was with regard to the third one.

Now, keep in mind that there was no U.S.P. method at that time. There was no U.S.P. method that became official in any respect until November 1, 1950, and, as Dr. Jeffreys stated, prior to July 20, 1950, he knew of no method at all that was suitable for the assay involved here.

The Kober method, for instance, was one which was simply for the pure estradiol and did not involve any excipients.

Now, there were three other witnesses that are referred to in that letter which I could have brought in, and that I did not bring in for the reasons I will give you, and I was going to state the reasons they were not brought in. One of them is a chemical analyst here in town who ran an assay on two of these lot numbers, and his findings, if you please, were way, way down, at 1 and 2. That is one extreme.

Now, on the other extreme, we find the Adam Laboratories in New York. When I took her deposition, at that time the evidence in this case had not developed, I had not had Dr. Hoyt and Dr. Sobel conduct these experiments, and on the face of things I assumed that the woman's analysis was correct.

However, in the investigation that I subsequently made and particularly in view of Dr. Hoyt and Dr. Sobel's experience, [325] I was absolutely convinced that the woman wasn't correct in her assay, in the way she did it or in her conclusions.

I was confronted, then, with this situation: Was I going to take the position that she accurately extracted the full amount of estradiol from these tablets, which were samples of those involved here? She got 21, 22, or within the allowable limit. Or, was I going to discard her testimony and say, "No"? Was I going to discard her testimony and say, "No. My position is that the estradiol cannot be extracted"?

Well, I couldn't use both of them. Now, which one was true? And I am not in the habit of coming into court and offering evidence that I don't think is true.

On the basis of Dr. Hoyt's background and Dr. Sobel's background and Dr. Jeffrey's vast experiences in the field of assaying chemicals, I was convinced that they were right and she was wrong.

Bio-Science Laboratories out here is another one that conducted an assay, and they found 14, about 14½.

Now, what in the world is that going to do to help the court? Here, I had this situation with Hoyt's testimony. Where is that little chart?

The Clerk: Exhibit I.

Mr. Elson: Here, I come into this situation. Now, mind you, Dr. Jeffreys stated that on the first run he ran under U.S.P., there was practically

nothing. So then he used a [326] Waring blender for the purpose of better extraction, and he found 8—9.1 and 9.5.

Now, mind you, Dr. Jeffreys made no corrections at all.

The Court: May I just say this?

Mr. Elson: Yes.

The Court: In case you misunderstood my question, I did not mean why didn't you come in with an analysis made under the U.S.P. procedure and method, because I realize that in your defense you have been attempting to show the inaccuracy and inefficiency of the U.S.P. method.

Mr. Elson: As applied to this product.

The Court: As applied to this product.

Mr. Elson: Yes.

The Court: But, of course, one of the things that would have shown that very clearly would be, for instance, if other methods had been used, because the important question is: What was the quantity of micrograms in that tablet?

Mr. Elson: That is right.

The Court: So that, if you had no faith in one system, then, of course you put on men who had no faith in that system, for that purpose. But the simplest, the most effective way to prove that would have been to have men testify who used other systems, who, after making analyses, would tell you, for instance, that there were 22 micrograms in that tablet. I asked Dr. Hoyt that question. [327]

I asked Dr. Hoyt, "If they had submitted to you the particular tablets involved here, could you have

made an analysis that would accurately have told us the number of micrograms in it?"

He said, "Yes, I believe I could."

Now, just assume that he could. Then, of course, with all this testimony where he tears down this other system, if he could testify that actually on these tablets that these chemists have run their tests on to show there are 6 micrograms where there are supposed to be 22, 15 where there are supposed to be 22, and so on, "By using" such and such "method, I have run a test analysis that shows that actually there were 22 micrograms in there," if that evidence was available, surely it would have been produced here in court. If he could have made an analysis by any recognized or reputable method that would have shown 22 micrograms in those particular tablets, surely you would have produced that evidence.

Mr. Elson: May I call this to your attention, your Honor, that under Section 351(b) of the Federal Food, Drug, and Cosmetic Act, when a drug is recognized in an official compendium, it has then become what is known as an official drug and there is then only one method of assay.

The Court: Under Section 351(b)?

Mr. Elson: Under Section 351(b).

The Court: As a matter of fact, when there was a little [328] lull, I looked it up, and I have been trying to distinguish that Section 351(b). What difference does that make? Of course, it recognizes the U.S.P. But you put on your evidence to disprove that method, isn't that true?

Mr. Elson: To show that it isn't suitable to this, yes.

The Court: All right. Then, how could you show more effectively that it is not suitable than by showing that there were 22 micrograms in those tablets?

Mr. Elson: Your Honor, the only way we could do that is not by using a method of assay which would be absolutely inadmissible in this proceeding, insofar as any preparation of this case is concerned, but it would be to do just what we did, and to show that at the time of manufacture the amount of estradiol was put into the product that was represented to be a 5 per cent plus overage.

The Court: What makes you think that any evidence would be inadmissible? Certainly Section 351, Subdivision (b), would not make inadmissible any testimony here that would show the content of that alpha-estradiol in these tablets that are here in controversy.

Mr. Elson: Your Honor, may I go on a little further on that?

The Court: Yes. You can finish now.

Mr. Elson: Let us say this: Here we have a drug that is an official drug; let us say that the Government comes in [329] and they charge that the drug is a drug embodied in an official compendium and its strength, purity, and quality are below the amount listed in that compendium. There is only one way in the world that the Government can prove a case, and that is by using the U.S.P. method of assay that appears in there.

Now, in such a case, believe me, it would be no

defense for a defendant to come in and say, "Well, we ran it by another test over here and we find that it is up, and that is the one that should govern." That isn't going to help any.

The Court: You don't get my point. I will say this once more and then I won't interrupt you again. My point is this:

It is true that that is the test that is recognized and, in order for them to prove their case, they must prove that they arrived at their conclusion by the use of that test. I agree with you up to that point.

Now, you have one of two things. The defendant is guilty, if it does not come up to that test. Or, as a defense, and this is the course you have taken, you hope to show that for the purposes here this test is not suitable and it cannot effectively acquaint us with the proper quantity of alpha-estradiol in these tablets. So you have proceeded to do that.

Now, my only point is this: You say it is not admissible. You have offered all kinds of other evidence, conjecture; you have had your chemists take the stand here and tell about [330] simulated experiments; all for what purpose? To reflect upon the method used by these chemists. My point is, what would better reflect upon that method than a showing that there were 22 micrograms of this alpha-estradiol in these tablets, not that they could use some different method to the point of proving it? In other words, I say that if anyone could have taken the stand and said there were 22 micrograms in that tablet, that of course is admissible evidence.

Of course, the question of the weight to be given that evidence would depend largely upon how he determined that, and if he looked at the sun and made a guess, of course his testimony would have no weight. But, if he used some recognized method that is recognized in the science of chemistry, of course it would be given considerable weight.

Mr. Elson: Your Honor, maybe I misunderstood how to try this case. I thought that I did.

The Court: I did not mean to criticize you.

Mr. Elson: No, no.

The Court: I am just mentioning it for your benefit so that in your argument you can answer the question.

Mr. Elson: In view of your Honor's conclusion, I believe it becomes important to ask to reopen the case and read into the record the deposition of Elizabeth Adam Weiss. Miss Adam used the U.S.P. method and she qualified herself extensively. The only reason I did not put it in, I believe that under the [331] tests of Hoyt and these other fellows, that that amount of estradiol could not be extracted, but here we have got the positive testimony of a chemist who assayed, I think, all of these samples, didn't she? If not all of them, at least two of them. I can tell you in a moment. She assayed two of them —she assayed all three of them and found them to be equal to or above the labeled potency.

The Court: Do you want to reopen your case and put it in?

Mr. Elson: I would like to, if I may.

The Court: The court will grant you permission.

Mr. Klinger: If your Honor please, I object to the reopening of the case at this time. The deposition was here at all times for the defendants to use it.

They were submitted to other laboratories who came in with low-potency results.

Mr. Elson: That is true.

The Court: The court will permit you to reopen the case, if the evidence is available, and put it in.

Mr. Elson: May I call Mr. Klinger as a "witness" and let him read this?

The Court: How long is it?

Mr. Klinger: It is pretty long.

Mr. Elson: Well, it runs from page 22 over to page 56.

The Court: Do you want to come back in the morning?

Mr. Elson: It is a little late. [332]

The Court: All right, you can come back in the morning.

Mr. Elson: I am sorry to impose this way on the court, but it wasn't through any lack of preparation on my part, but maybe through a misconception of theories.

The Court—Do not misunderstand me. I am not saying that you tried your case wrong, but I am not saying that you are improving your case by putting this in. I merely raised the question that was in the mind of the court. Now, I am not criticizing the method in which you are trying your case. You may have been right in the first instance.

If you want the case reopened, the court will per-

mit you to reopen it and put in that deposition, if you care to, and the court will consider it along with all the other evidence.

Mr. Elson: I ask permission to do so.

The Court: Now, I think perhaps we better put it over until the morning. The deposition covers about 30 pages, you say?

Mr. Elson: About 30 pages.

Mr. Klinger: I think we could read it pretty rapidly.

Mr. Elson: I would just as soon do it now.

The Court: All right. Then, will your argument be concluded?

Mr. Elson: Pardon me?

The Court: Will you have further argument?

Mr. Elson: Not unless the court feels further argument [333] is necessary. Of course, I could go on and argue like any lawyer could.

The Court: All right. Read it into the record.

Mr. Elson: Your Honor, in connection with this thing here, as to these other assays, as I told you, there was one that was incorrect, by Shankman Laboratories. That was around 1 and 2. Of course, that isn't proving anything. Bio-Science runs one and gets 14. In other words, what we have there are more or less opposite extremes. Now, if the court be interested in hearing that—Incidentally, Shankman did, by the U.S.P., run tests, and by a couple of other methods which he found in the literature and which he would say are wholly inapplicable.

The Court: I don't say that you should put them in.

Mr. Elson: I don't see what good they would do.

The Court: It seems to me they would be supporting the Government's case.

I am not asking you to put this in, unless you want it as part of your defense.

You referred to certain assays that have been made, which are not evidence before the court, and apparently, if they were, from what you say they would support the Government's case. I am not asking you to put them in.

Mr. Elson: I don't see how they would help the court one way or another. [334] May I sit down while I am reading from this deposition?

The Court: Yes.

Mr. Klinger: I intend to offer those few [335] letters.

Mr. Elson:

"MRS. ELIZABETH ADAM WEISS
was sworn and testified as follows:

"Direct Examination

"By Mr. Elson:

"Let the record show that Miss Adam was sworn in by the same individual, Mr. William Derkasch, Notary Public for the State of New York, Number 24-0928550, Expiration Date, March 30, 1953.

"Q. (By Mr. Elson): Will you please sit down,

(Deposition of Elizabeth Adam Weiss.)

Miss Adam. What is your full name, Miss Adam?

"A. Elizabeth Adam Weiss.

"Q. Will you try and speak slowly because this stenographer here has to get this down in shorthand and when we leave here there is going to be a three-thousand-mile trip between us, and I would much rather have it straight now than have it straightened up later on. Will you speak slowly, please? A. Yes.

"Q. Are you the owner of the Adam Laboratories? A. Yes.

"Q. And that is located at—the laboratory is located at 318 East 121st Street, New York City?

"A. Yes.

"Q. Where were you born?

"A. Budapest, Hungary.

"Q. When? [336] A. April 23, 1916.

"Q. When did you come to the United States?

"A. December, 1941.

"Q. And did you receive any of your education in Hungary? A. Yes, I did.

"Q. Will you tell us what that was?

"A. I went four years to grade school, public school; eight years to the gymnasium.

"Q. The gymnasium corresponds to what sort of school in this country?

"A. High school plus college.

"Q. And what else?

"A. I went four years to the university, and I studied Chemistry, Physics and Mathematics, and graduated in 1940.

(Deposition of Elizabeth Adam Weiss.)

"Q. What was the name of that university that you went to?

"A. That was the Pazmany Peter University of Science, Budapest, Hungary.

"Q. And what were your Majors when you attended that university?

"A. Chemistry, Physics and Mathematics.

"Q. Now, after coming to the United States, did you receive any further work in [337] Chemistry?

"A. Yes, I went to New York University for graduate courses.

"Q. In what?

"A. Chemistry—Organic Chemistry.

"Q. Now, are you a member of any scientific societies, chemical societies?

"A. Yes, I am a member of the American Institute of Chemists; that is, the American Institute of Chemists; American Association for Advancement of Science; and American Society for the European Chemists and Pharmacists, American Chemical Society.

"Q. Are you familiar with a book known as Who's Who in Chemistry? A. Yes.

"Q. The 1951 edition?

"A. Yes, I am in it.

"Q. Are you in it? A. Yes.

"Q. Did you apply to have your name listed in that book? A. No.

"Q. Do you know how your name happened to be listed in it?

(Deposition of Elizabeth Adam Weiss.)

"A. I guess they must have got my name from somewhere, maybe from the Institute of [338] Chemists.

"Q. Did you pay them any money to have your name put into it? A. No.

"Q. Where was your first place of employment in the United States?

"A. Molnar Laboratories.

"Q. And where are they located?

"A. 211 East 19th Street.

"Q. What business are they in?

"A. Chemical testing laboratories, analytical testing laboratories.

"Q. What years were you employed there?

"A. From 1942 until 1945.

"Q. In what capacity?

"A. As analytical control chemist.

"Q. And where were you next employed?

"A. Estro Chemical.

"Q. Estro Chemical? A. Yes.

"Q. Are they located in New York City?

"A. 151 East 126th Street.

"Q. And what business are they engaged in?

"A. Ampular medications.

"Q. Ampules of what?

"A. Hormones; they made iron preparations and [339] procain preparations, but the main items were vitamines and hormones.

"Q. And you were employed there during what years? A. From 1945 to 1947.

"Q. Now, then—1947, is that when you started

(Deposition of Elizabeth Adam Weiss.)

your business known as the Adam Laboratories?

"A. That's right.

"Q. Have you ever done any work in hormone research? A. Yes.

"Q. You have? A. Yes.

"Q. And when did you commence to do that?

"A. In 1942.

"Q. Was that when you were with Molnar Laboratories? A. Yes.

"Q. And did you continue on with hormone study and research since? A. Yes.

"Q. And at the present time? A. Yes.

"Q. And now, did you receive a sample of a product from Woodard Laboratories labeled Estrocrene, have you got any records that you might want to refer [340] to, to refresh your recollection?

"(Pause.)

"Q. Did you receive a sample of a product labeled Estrocrene from the Woodard Laboratories, September 11, 1950? A. Yes.

"Q. And would that have a lot number on it?

"A. Yes.

"Q. What was the lot number?

"A. 005323.

"Q. Just a minute——

"A. I received two samples at the same time.

"Q. (By Mr. Elson): Let us take the first one here. Was one of them 001——"

He has "Elson." That is wrong. The next should be:

"Mr. Sharison: I object to the question."

(Deposition of Elizabeth Adam Weiss.)

Mr. Klinger: All right.

Mr. Elson: (Reading.)

"Q. What lot numbers did you receive from Woodard Laboratories on or about September 11, 1950?

"A. One was—I received 001168; and the other one was 005323.

"Q. Now, let us take Lot Number 001168, did you conduct an assay of that sample?

"A. Yes. [341]

"Q. Assay for what?

"A. For Alpha-estradiol content.

"Q. And what method of assay did you use?

"A. U.S.P. 14, Pabe No. 227.

"Q. And did you complete that assay?

"A. Yes, I did.

"Q. About what date?

"A. September 22nd.

"Q. And tell us what you found as a result of your assay as to the Alpha-estradiol content per tablet.

"A. Point 0215 milligrams per tablet, that is the 001168."

Mr. Elson: Can we stop there for just a moment to translate the milligrams into micrograms?

Mr. Klinger: What difference does it make?

Mr. Elson: Or, shall we do it later?

Mr. Klinger: It is not necessary. We have used them both interchangeably throughout the trial.

Mr. Elson: All right. (Reading.)

(Deposition of Elizabeth Adam Weiss.)

"Q. Now, we will take up Lot Number 005323, did you conduct an assay of that? A. Yes.

"Q. And for what purpose?

"A. For Alpha-estradiol content. [342]

"Q. And what method of assay did you use?

"A. U.S.P. 14, Page 227.

"Q. And what date did you complete that assay?

"A. September 22, 1950.

"Q. And what did you find as a result of that assay with reference to the Alpha-estradiol content in each tablet?

"A. Point 0212 milligrams per tablet.

"Q. Did you, on or about November 3, 1950, receive a product from Woodard Laboratories similarly labeled but containing an FDA Seal Number 88-164K on it? A. Yes.

"Q. And what lot number did that bear?

"A. 107694.

"Q. What was the date of that?

"A. November 3, 1950.

"Q. And did you conduct an assay of that product? A. Yes.

"Q. What method of assay did you use?

"A. U.S.P. 14, Page 227.

"Q. When did you complete your assay of that?

"A. November 10, 1950.

"Q. And what did you find with reference [343] to the Alpha-estradiol content per tablet?

"A. Point 026 milligrams per tablet.

(Deposition of Elizabeth Adam Weiss.)

"Cross-Examination

"By Mr. Sharison:

"Q. Shall I call you Miss Adam?

"A. Miss Adam.

"Q. Miss Adam, you told us before in your testimony that you are a graduate of the Pazmany Peter University of Science of Budapest, Hungary, is that correct? A. Yes.

"Q. And that while at that university you majored in chemistry, physics and mathematics?

"A. Yes.

"Q. And I think you told us that you attended that university for four years, is that correct?

"A. That is correct.

"Q. Wait until I finish my question because the reporter can't take us both while we are both talking. For what period of time in each week, in each month, did you attend that university during those four years? Did you understand my question?

"A. Yes, let's see, in Hungary you have to take courses and you have to take so many hours in a week—they tell you how many hours—you can't just take [344] any course you like, it's just like any other school, we had to take 60 hours a week and from that 60 hours we divided approximately 20 hours for each subject.

"Q. In each week? A. In each week.

"Q. What other subjects, besides chemistry, physics and mathematics did you take at the university? A. I was——

"Q. During the four years?

(Deposition of Elizabeth Adam Weiss.)

"A. I was taking a course in Hungarian Literature and Philosophy and German Language.

"Q. Did you have a record of attendance while attending the university?

"A. Yes, I have it, but not with me.

"Q. Does the university take a record of your attendance?

"A. Surely, we have a book where they put in each course, what we take; for instance, first you have to take Inorganic Chemistry, five hours a week. You have to take Physics, Elementary Physics, 5 hours a week, that is the minimum. Then you have to take Mathematics, Calculus, 5 hours a week; and in the first year, I was taking Hungarian Literature and German Language and Philosophy; and then next year, you have to take Laboratory, Analytical Laboratory, [345] and we studied Qualitative and Quantitative Analysis. Each was about 20 hours a week laboratory course.

"Q. That was during the second year?

"A. During the second year. The second year was the Qualitative; and the third year was the Quantitative; and the fourth year, we had to take Organic Chemistry, Laboratory and Lecture, and then we had to take Physical Chemistry; and then every year starting from the second year, we had Optics and Electricity in Physics.

"Q. Do I understand you to say that in the first year you took five hours a week of Chemistry and in the second year you took twenty hours of Qualitative Analysis?

(Deposition of Elizabeth Adam Weiss.)

"A. In the second year, I took twenty hours of Laboratory, and about ten hours Lectures a week, and the rest of it was divided by, between the Physics and Mathematics.

"Q. And Language and Philosophy?

"A. And Language and Philosophy and Education.

"Q. And in the third year, what amount of Chemistry did you take?

"A. The third year, I had to take Quantitative Analysis. The first half, we took Volumetric Analysis and the second half, was Gravimetric [346] Analysis.

"Q. That is the third year? A. Yes.

"Q. What about the fourth year?

"A. We had lectures, too, the same subject, Organic Chemistry.

"Q. How many hours?

"A. About five hours, every day an hour. And the third year, I had Physical Chemistry, too, and Physical Chemistry Laboratory, eight hours a week.

"Q. In the fourth year?

"A. We had Organic Chemistry.

"Q. How many hours?

"A. About twenty hours Laboratory, and about five hours Lectures in the fourth year. We also had Radio Activity; and Laboratory, eight hours Laboratory in the Radio Activity, and Food Chemistry.

"Q. You graduated in 1940?

"A. 1940, yes.

(Deposition of Elizabeth Adam Weiss.)

"Q. And did you get a degree? A. No.

"Q. No degree?

"A. We don't have a degree except the Ph.D., but I had all the credits for the Ph.D.

"Q. But you didn't get the degree?

"A. No, I wasn't allowed to go into the university [347] any more. That was the Hitler era.

"Q. Then you arrived in the United States in December, 1941, is that correct?

"A. Yes, that is correct.

"Q. Did somebody sponsor your arrival in the United States? A. My parents.

"Q. And your parents were living here before you arrived?

"A. My father came two years before I arrived.

"Q. He arrived in 1939? A. Yes.

"Q. Where does your father live now?

"A. With me. We are living now at 346 East 24th Street.

"Q. Your father arrived in 1939? A. Yes.

"Q. So, I assume when you arrived here in 1941, your father was an American citizen?

"A. No, not yet.

"Q. Didn't somebody, besides him, sponsor your arrival here?

"A. You mean, who sent an affidavit?

"Q. Yes.

"A. My cousin, Mr. Lengyel, he is an [348] instructor at N. Y. C.—New York University.

"Q. Miss Adam, when, for the first time, did you ever hear of International Hormones, Inc.?

(Deposition of Elizabeth Adam Weiss.)

"A. International Hormones, in 1947, when I started my business.

"Q. And prior to 1947, did you ever meet or come into contact with or have any relationship with, socially or in business, with anybody connected with the International Hormones, Inc.?

"A. No.

"Q. And, for the first time, you are saying now, as I understand it, you met anybody connected with International Hormones, Inc., was in 1947, is that right? A. That's right.

"Q. All right. Now, your arrival in this country in December, 1941—am I correct in assuming that your first job in this country was with Molnar Laboratories in 1942? A. Yes.

"Q. And you worked with that company from 1942 to 1945, is that right? A. Yes.

"Q. And while employed with that company, you made various assays of products submitted to you by your employers of that company, is that correct? [349] A. That is correct.

"Q. Now, how many assays of various products, of various kinds, did you make during the period 1942 to 1945? A. How many assays?

"Q. Yes.

"A. I was doing assays continually, I cannot give you——

"Q. Well, in relation to specific items, did you make one a day or more than one a day?

* * *

(Deposition of Elizabeth Adam Weiss.)

"Mr. Sharison: Any items.

"Mr. Elson: I mean to allow the fullest leeway here, but she said that she conducted assays continually, and I am going to suggest—without meaning at all to tell you how to handle it, that we can get it quicker if you have in mind a certain product—that it be asked her.

"Mr. Sharison: Your objection is on the record. Now let her answer the question.

"Q. Please answer that question. [350]

"A. If you do a biological estrogenic assay, that comes to about 3 or 4 days to run one assay, and then that was to operate on rats. I did a biological assay, maybe once a week. A chemical assay at Molnar, for instance, Calcium Iodobehanate—find it in the U.S.P.—I just give you an example because that assay took me about a whole day.

"Q. Miss Adam, believe me, we understand that, but how many assays of all kinds did you make in the period that you mentioned—for Molnar?

"A. 200 assays—I don't know—300 assays, I cannot tell you, I really cannot tell you if I would do an assay each day, I would have to make some confirmation.

"Q. Is it your best opinion that——

"A. It is about 500 assays.

"Q. About 500? A. Yes.

"During the period that you worked for Molnar Laboratories? A. Yes, for Molnar.

"Q. Is that the figure that you finally determined? A. Yes.

(Deposition of Elizabeth Adam Weiss.)

"Q. Of the number of assays of all kinds [351] that you made for Molnar, how many assays of Alpha-estradiol did you make during that period?

"A. At Molnar's I didn't do any Colorimetric assays, I did biological assays—they didn't have the Colorimetric method out yet.

"Q. Isn't it a fact that the Colorometric assay for Alpha-estradiol is the U.S.P. method?

"A. Yes, in the U.S.P. 14, since 1950, with its use. Since 1950, the Colorimetric method is the U.S.P. method, the official method.

"Q. Miss Adam, how many assays of Alpha-estradiol did you make during the period that you worked for Molnar? A. About 50.

"Q. About 50 during four years that you worked for Molnar? A. Yes, Bio assays.

"Q. And the method you used was the Bio assay? A. Yes.

"Q. Miss Adam, what would you say if I told you that the records indicate at Molnar's that you had done no more than fifteen assays of Alpha-estradiol while you worked at Molnar's what would you say about that?

"A. I cannot say anything because I [352] remember I did very many assays there.

"Q. And can you still say that you did approximately 50?

"A. I'll tell you something, I cannot remember exactly how many I did. I'll tell you exactly how I figured. I figured approximately one assay, one a month, and for two years there would be—no,

(Deposition of Elizabeth Adam Weiss.)

I made a mistake, I figured—in two years, it would be 24.

"Q. And according to your figure——

"A. I can't remember—Estradiol—exactly how many assays I did, but I cannot remember, approximately, I didn't do more than one a month.

"Q. And it is possible that you had much fewer than one a month? A. Yes.

"Q. How many assays of Alpha-estradiol did you make prior to your employment by Molnar's?

"A. None.

"Q. So the first assay of Alpha-estradiol you ever made was made at Molnar's. A. Yes.

"Q. And was it made by you, personally, or in conjunction with other chemists?

"A. In conjunction with other chemists.

"Q. And with whom did you make those [353] assays? A. Doctor Julius Molnar.

"Q. Anybody else?

"A. With anybody else. From time to time we would have somebody else, but I don't remember the names any more.

"Q. Isn't it a fact, Miss Adam, that normally, in assays of Alpha-estradiol, it is customary to have at least three chemists working together on the assay? A. No.

"Q. You became employed with the Estro Chemical Company in 1945, and you worked for that company until 1947, is that correct?

"A. Yes.

(Deposition of Elizabeth Adam Weiss.)

"Q. How many assays of Alpha-estradiol did you make while employed with that company?

"A. None.

"Q. None at all? A. No.

"Q. Did you engage in any study of hormones while you were employed by the Estro Chemical Company? A. No.

"Q. And you said you were engaged in hormone research in 1942, was that prior to your employment by Molnar, or after? A. During. [354]

"Q. And where did you conduct that research?

"A. At Molnar's.

"Q. In Molnar's? A. Yes.

"Q. Did the Molnar Company conduct a large part of its business in connection with hormones, or a small part of its business? [355]

* * *

"Q. If you know?

"A. At those times, he had quite a large hormone business.

"Q. What proportion of his business was in hormones?

"A. Twenty-five per cent.

"Q. How do you know that?

"A. How do I know it?—because. This is only in a rough figure. I figured out, for instance, in a month, how many chemical assays I did; and in proportion to the chemical assays I did, the hormones were about 25%.

"Q. Besides yourself and Dr. Molnar, were there

(Deposition of Elizabeth Adam Weiss.)

any other biologists or chemists employed by [355] the company? A. Nicholas Molnar.

"Q. Who was Dr. Nicholas Molnar? What is Nicholas Molnar? A. A chemist.

"Q. What was Dr. Molnar's name?

"A. Dr. Julius Molnar, he's an M. D.

"Q. Were there any other chemists or biologists employed there besides those you mentioned?

"A. There was a girl there at that time—she was a medical technician.

"Q. During what period in that time that you were employed was she employed?

"A. The same time, she was there when I went there, and she still was.

"Q. The technician is usually a helper, isn't that correct? A. Yes, she is a helper.

"Q. She is a scientist?

"A. I don't know what you mean by 'scientist.' She graduated from Hunter College.

"Q. She had degrees? A. Yes, a B.A.

"Q. Any other degrees? A. No. [356]

"Q. Now, in any case, during the period 1945 to 1947, you conducted no assays of Alpha-estradiol? A. No.

"Q. And then you opened your own business, Adams Laboratory, in 1947? A. Yes.

"Q. Who were employed at the Adams Laboratory, besides yourself?

"A. Only one, only myself.

"Q. Only yourself? A. Yes, only myself.

(Deposition of Elizabeth Adam Weiss.)

"Q. Between 1947 and September, 1950, how many assays of Alpha-estradiol did you make?

"A. I don't want to tell you a false number. I will have to think—in 1947, I made at least twelve of them—let's see, thirty would be——

"Q. Thirty? A. Yes.

"Q. During the period 1947 to 1950?

"A. Yes, but that is a lower limit because it may have been smaller, but I don't want to tell you because I can't—I have my records in the lab.

"Q. Did you bring them? A. No.

"Q. But you knew you were going to be [357] examined about your analyses of Alpha-estradiol when you came here, to do it?

* * *

"Q. Where do you have your residence at present? A. 318 East 121st Street.

"Q. That is the place of your business?

"A. Yes. I have all the records from 1947 and I can go back and count them and tell you the exact number.

"Q. Tell us, for whom you made these assays of Alpha-estradiol?

"A. I did it for International Hormones; National Drug Company, Philadelphia; Gotham Pharmaceutical; Estro Chemical Premo Pharmaceutical; C. F. Kirk and Company; U. S. Hormones Corporation.

"Q. Who else?

"A. I don't remember any more.

(Deposition of Elizabeth Adam Weiss.)

"Q. Woodward Laboratory would be another?

"A. Woodward, yes.

"Q. Now, prior to 1950, at your own laboratories, [358] what kind of assays did you make, the bio assays? A. Yes.

"Q. And after 1950, you used the U.S.P. 14, Page 227? A. Yes.

"Q. Is that correct? A. Correct, yes.

"Q. And did you use that in all cases of your assays of Alpha-estradiol in 1950? A. No.

"Q. In other words, you used both methods? You used both methods in 1950? A. Yes.

"Q. In what month in 1950 did you become aware of the U.S.P. 14, Page 227 method?

"A. When the U.S.P. 14 was published first, in November. No, I got this book September.

"Mr. Elson: This book you are speaking of is the U.S.P. 14?

"The Witness: Yes, as soon as it was in the literature, it became official, in November.

"Q. You got it September, 1950? A. Yes.

"Q. Were you aware of the method of analyses described by U.S.P. 14, Page 227, prior to September, [359] 1950? A. Yes.

"Q. When were you first aware of it?

"A. I know for a long time because I saw it in the literature already.

"Q. When did you first become aware of it?

"A. You see, I used another method, the Food and Drug Administration Carol-Moliter-Haenni,

(Deposition of Elizabeth Adam Weiss.)

and the U.S.P. method is just a modification of this method.

"Q. Well, when you, when did you first become aware of the Carol-Moliter-Haenni method?

"A. It was 1947.

"Q. 1947? A. Yes, here it is.

"Q. And would you say that is a modification of the U.S.P. 14, Page 227? Am I correct in assuming that it is practically the same method?

"A. I would say really there is not too much of a difference because it—some workers claim that you can get a very good result with the original method, too. That's what I read in the literature.

"Q. Well, Miss Adams, the U.S.P. 14 method is a refinement of the Carol-Molitor-Haenni method, is that right?

"A. Yes, here you use a Phenol reagent and a [360] modified Kober, and Iron Phenol reagent.

"Q. In other words, it is your opinion, Miss Adams, as a chemist, that there is little difference between the Carol-Molitor-Haenni method and the U.S.P. 14 method, is that true? A. Yes.

"Q. Now, coming down to the analyses that you made for Woodard Laboratory, I believe you told us that you received Lot Number 005323 and the Lot Number 001168 from Woodard on September 11, 1950, and you made assays of those products?

"A. Yes.

"Q. And they were for Alpha-estradiol?

"A. Yes.

(Deposition of Elizabeth Adam Weiss.)

"Q. And do you have your reports with you which indicate your assays of those products?

"A. Yes.

"Q. Well, look at them and tell us when you got those products, did each one of those batch numbers have a label on them?

"A. I have here the products, too.

"Q. All right, then, refer to them, please.

"A. Here they are (offering several bottles).

"Mr. Elson: Let the record show that the witness has shown to Assistant United States Attorney a bottle [361] containing tablets, the front label of which states: Estrocrine Tablets, the number of tablets is marked out and in red typewriting across it appears: Lot Number 001168; and another bottle containing what appears to be similar tablets, the bottle being the same size and labeled: 'Estrocrine, 30 tablets,' and in red typewriting across the face, the following: Lot Number 005323.

"Q. Now, in reference to these products you received from Woodard which I now hold in my hand which have the Lot Numbers 001168 and 005323, they do have labels on them, is that right?

"A. I have it in my report.

"Q. But they do have labels? A. Yes.

"Q. And they are the labels of the Woodard Laboratory, are they not? A. Yes.

"Q. Even though the name does not appear on them?

"Mr. Elson: I object to the form of the question."

(Deposition of Elizabeth Adam Weiss.)

I withdraw the objection.

"Q. Look at the bottles and tell us whether the name, Woodard Laboratories appears on the labels of these bottles? A. No. [362]

"Q. They came in a package?

"A. Yes, in a package, with a shipping slip. I have the shipping slip also here.

"Q. Does the package contain a label which indictates that the contents came from Woodard Laboratories? A. No.

"Q. Let me look at the package.

"A. That was not the same package, that is the other sample I got from Woodard Laboratory.

"Q. Do you have the container in which these two bottles we are now talking about came?

"A. No.

"Q. But in the package which contained these bottles you received a shipping slip? A. Yes.

"Q. May I look at it.

"A. Just a minute, I have to get it out, please.

"Q. You are handing me the shipping slip which came with the two bottles we are talking about?

"A. I am handing you a letter when they wrote me that they are sending me those two samples.

"Q. And I shall read the letter that you are handing me, for the record. The letter appears on the letterhead of Woodard Laboratories, Inc., [363] 2308 West 7th Street, Los Angeles 5, California, Dunkirk 7-3158 with the following typewritten matter appears on the letter: Adam Laboratory, 341

(Deposition of Elizabeth Adam Weiss.)

East 26th Street, New York City 10, New York; Gentlemen: Under separate cover we are sending two bottles of our product, Estrocrine Lot Numbers 001168 and 005323.

"'The labeled potency of these tablets is 0.22 mg of Alpha-estradiol and we wish to have them analyzed for the Alpha-estradiol content and report submitted as you did on August 4; Sincerely; Woodard Laboratories, Inc.'; and then there appears the signature in ink: 'John L. Sullivan'; and underneath that, there appears typewritten: 'John L. Sullivan,' and some various initials on the left, indicating the stenographer and the person sending the letter, in capitals: 'JLS:ec.'

"Now, you received this letter some time in the early part of September, 1950, is that it?

"A. Yes.

"Q. And you received the samples some time about September 10, 1950, is that right?

"A. That's right.

"Q. And then you made the analyses that you mention in your direct testimony? A. Yes.

"Q. Now, prior to receiving this letter, according [364] to the letter you had made a previous analysis for Woodard, is that correct?

"A. Yes.

"Q. And according to the letter, you made it some time around August 4, is that right?

"A. That is correct.

"Q. Now, did you have any conversation or other correspondence with either Woodard Labo-

(Deposition of Elizabeth Adam Weiss.)

ratory or anybody else in connection with the analyses that you were to make—you were able to make on August 4, 1950, or the ones that you made in connection with this letter, of the product of Estrocrine?

"A. I don't understand the question—I received the first samples——

"Q. And when did you receive those first samples? A. May 5.

"Q. What year? A. 1950.

"Q. And whom did you receive those samples from? A. International Hormones.

"Q. From whom?

"A. From International Hormones—from Mr. Forman.

"Q. And where did you receive those samples from Mr. Forman? [365]

"A. International Hormones mailed it to me to the Laboratory.

"Q. Prior to receiving them, did you have conversation or correspondence with Mr. Forman or anybody else at International Hormones, [366] Inc.?

* * *

"A. Mr. Forman called me up the early part of May and he told me, 'I am sending you three boxes of tablets by Woodard Laboratories; you analyze it and send me the report to International Hormones.'

"Q. Was there any other conversation besides that? A. No, we didn't—nothing.

(Deposition of Elizabeth Adam Weiss.)

"Q. What is your answer?

"A. Nothing else, that is all.

"Q. Did the conversation take place on the telephone, or personally? A. On the telephone.

"Q. And was there one conversation, or more than one? [368]

"A. It is probable there was another conversation before I sent him the report; I gave him the report over the phone; I usually do that.

"Q. So you had a conversation with him prior to his sending you the samples? A. Yes.

"Q. And you had a conversation with Mr. Forman prior to sending him your report of the analyses of those samples? A. Yes.

"Q. According to the letter, you made those analyses on August 4; is that correct?

"A. What I made on August 4, that was already sent to me by Woodard Laboratories.

"Q. Now, you have handed me three boxes which bear, among other things, the printed words: 'Woodard Laboratories, Inc.,' on each one of the three boxes? A. Yes.

"Q. Written in pencil there appear the words, on each one: '10 tablets'? A. That is right.

"Q. And on one of the boxes there appears the number, 497567; and on the second the lot number, 897618? A. Yes. [369]

"Q. When did you make the analyses of the tablets contained in these three boxes?"

There is an objection there, and I will withdraw it. (Reading:)

(Deposition of Elizabeth Adam Weiss.)

"Q. For the record, let me state that in relation to one of these boxes I am referring to, it has the printed words 'Woodard Laboratories' on it. It also contains, in writing in pencil, Lot Number 107694, which was referred to in the witness' direct testimony as being a number that she made an assay of, of a product sent to her under the same lot number by Woodard Laboratories, sometime in August, 1950.

Now, with respect to the numbers, the witness has testified that she received these boxes from International Hormones, Inc.; that they were products of Woodard Laboratories, Inc., and for which she made assays and then forwarded her report to International Hormones, Inc. It is my opinion that it has direct relevance, since the subject of the depositions relates to the products of Woodard Laboratories, and relates to various assays of the drug, Estrocrine, which is the product of the Woodard Laboratories, Inc., which is the subject of the present proceeding in California.

"Q. (Continuing): Will you answer my question?

"A. It was completed on June 9, 1950. [370]

"Q. And then you drew up a report?

"A. Yes.

"Q. And may I have your report?

"A. Yes (handing over a paper to Mr. Sharison). That is a copy of the report.

"Q. Now, before I refer to the reports that you have handed me, all of which are dated June 9,

(Deposition of Elizabeth Adam Weiss.)

1950, one of which refers to Woodard Laboratories, Inc., Lot Number 107-694; the next one refers to Woodard Laboratories, Inc., Lot Number 897-618; and the third refers to Woodard Laboratories, Inc., Lot Number 497-567, would you testify, Miss Adam, what type of assay did you make with respect to these assays?

"A. The Carol-Molitor-Haenni method.

"Q. In which, I think you previously testified, is little different from the U.S.P. 14 method; is that right? A. Yes.

"Q. Now, when you got these three samples, did you get them in just the form I have them here in my hand—in these small boxes?

"A. In the small boxes.

"Q. Were the tablets whole, or unbroken, when you received them? A. Unbroken. [371]

"Q. Each tablet was all in one piece?

"A. Yes.

"Q. And the assays of the tablets that you made were all in one piece and unbroken?

"A. Yes, they were unbroken.

"Mr. Elson: I don't get the last question.

"Q. Now, in connection with the Lot Number 897618, which appears on one box, your report indicates that—which is identified with your report—which bear Lot Number 897618. All these reports are dated June 9, 1950? A. Yes.

"Q. The result which appears in that report indicates Alpha Estradiol content, point 017 mgs. (slant) tablet; is that correct? A. Yes.

(Deposition of Elizabeth Adam Weiss.)

"Q. And in the report which refers to Woodard Laboratories, Inc., Lot Number 497567, your report indicates Alpha-estradiol content, point 0105 mgs. (slant) tablet; is that right?

"A. They are, yes.

"Q. And your report which refers to Woodard Laboratories, Inc., Lot Number 107694, states that the results of Alpha-estradiol content are point 016 mgs. (slant) tablet; is that correct? [372]

"A. That is correct.

"Q. Now, when you made these assays in connection with these lot numbers that I just referred to, did anybody tell you prior to that time that the content on the package that Woodard was selling indicated that the Alpha-estradiol content was point 022 mgs?

"A. I tell the truth, I remember that Mr. Forman told me something, but I can't remember what he said; and I didn't even put it down in my reports; that means that I wasn't—I mean, that I guess he told me something that he wasn't sure of himself.

"Q. If he had told you what the content should be, you would have put it in your report?

"A. Yes.

"Q. And the fact that you didn't put it in your report indicates that he didn't tell you?

"A. Yes. [373]

* * *

"Now, your analyses, made on September 11, in connection with the shipment that you received of

(Deposition of Elizabeth Adam Weiss.)

the two bottles that we previously referred to and which contained the numbers 001168 and 005323, prior to making that analysis, you were familiar with the Alpha-estradiol content of each tablet by the fact that it was on the bottle?

"A. In my work——

"Q. You were familiar? A. Yes.

"Q. And then you made the analyses of those samples? A. Yes.

"Q. In that case you found that the content with respect to Sample 001168 was point 0215; and with respect to Lot Number 005323, you found that the Alpha-estradiol content, after your assay, was point 0212; is that right?

"A. Yes, that's right.

"Q. Well, the fact that you were influenced by the notation on each of the bottles that contained those samples that the content was point 022 [374] milligrams, did that influence you in any way in making the analyses of those samples?

"A. No.

"Q. I am asking your opinion as a witness, you being an expert in the particular field"——

There is an objection. I withdraw it. Wait a minute. I withdraw it. (Reading:)

"Q. Isn't it a fact that chemists making assays of products are influenced by the information that they receive in connection with the assay to be made? Answer my question, yes or no?

"A. I can explain to you why we are not influenced.

(Deposition of Elizabeth Adam Weiss.)

"Q. First answer the question.

"A. We are not influenced.

"Q. You say chemists are not influenced in making assays by the information that they received in connection with the assay?

"A. I have to add something to it because I can't answer just plain yes or no to this question.

"Q. Answer it.

"A. If we receive a product which has a label on it which says the exact contents of the bottle, it saves us time because we now know how to dilute the sample and what range to use; but if we receive a [375] sample which is not marked, we must dilute it so many times in order to find the right range to read it in the Colorimeter. It is only extra work.

"Q. As I understand your answer, then, the chemist is influenced by the information he receives?

"A. I wouldn't change the results just because I have the label on it.

"Q. I don't mean, influenced, in that way.

"A. It means extra work, yes.

"Q. The assays that you made on June 9, 1950, and the assays that you made in September and November, I think you said in 1950, did you use the same method in all cases?

"A. Until September, yes, using the Carol-Molitor-Haenni, until September.

"Q. Until September when?

(Deposition of Elizabeth Adam Weiss.)

"A. I started using the U.S.P. from September 11.

"Q. So that the assays that you made on September 22 and November 3, 1950, were made by the U.S.P. 14 method; and the one that you made on June 9, 1950, was made by the Carol-Molitor-Haenni method? A. Yes.

"Q. And you say there is slight, if any, difference between them in the results obtained? [376]

* * *

"A. Yes. When I say that, it definitely wouldn't give so much difference to the method of assay. The method of assay won't cause that much of a difference between point 01 and point 022, fifty per cent difference.

"Q. Tell me, in 1950, did you have a Spectrophotometer as part of your equipment in your laboratory? A. Yes.

"Q. And did you have one or more than one?

"A. One. I have one Lumetron.

"Q. Do you have the readings of your Spectrophotometer in connection with any of the assays that you made of any of these samples?

"A. Yes, I have the readings, but not with me.

"Q. When can you produce them?

"A. Any time.

"Mr. Sharison: No further questions.

"Redirect Examination"

Oh, that is all. Now, your Honor, that completes that. [377] However, there were different numbers

that were used on these last ones, where she said 001168 and 005323. I can either get Mr. Klinger to stipulate with me, or call Mr. Sullivan to the stand to testify that those were numbers that he gave, actual lot numbers, to products involved in this case, and tie them into that.

Mr. Klinger: Which lot numbers were they? Which lot numbers? There was only one lot number.

Mr. Elson: No, no. 107694 was sent to her as No. 007913, and she ran an assay on August 4, 1950.

Mr. Klinger: Yes. All right. We will stipulate to that one.

The Court: You stipulate that if Mr. Sullivan was called, he would so testify?

Mr. Klinger: He would so testify.

Mr. Elson: Yes.

And that with reference to an assay run by her, Lot No. 002187, that was actually 107694, which she ran on August 4, 1950.

(Colloquy off the record between Mr. Klinger and Mr. Elson.)

Mr. Elson: All right, we better change that stipulation to read that there was sent to Elizabeth Adam a bottle bearing Lot No. 001168, which Mr. Sullivan had taken from a Woodard Lot No. 497567, and which she assayed on or about September 22, 1950, [378] and showed an estradiol content of 0.0215 milligrams, or 21½ micrograms; that Mr. Sullivan also took a quantity of tablets from Lot

No. 897618 and assigned to them a number 004323, and that those were sent to her and she assayed them according to U.S.P. method, and her results showed an estradiol content of 0.0212 milligrams of estradiol, or a little over 21 micrograms of estradiol, and that the tablets that Mr. Sullivan sent back were samples that had been received by Woodard Laboratories from the Food and Drug Administration, of some of those that had been picked up before this action started.

Mr. Klinger: It is so stipulated.

Mr. Elson: Thank you.

The Court: Your stipulation is that Mr. Sullivan, if called, would so testify?

Mr. Klinger: He would so testify if he were called.

Mr. Elson: That is right. I appreciate that, Mr. Klinger.

Mr. Klinger: That is perfectly all right.

And at this time, if you are through with that deposition, I will now offer, since it has now become relevant, the letters and correspondence for which a foundation has heretofore been laid, Plaintiff's Exhibit No. 2 for identification.

The Court: Very well. They will be received.

The Clerk: Plaintiff's Exhibit No. 2 in evidence. [379]

(The documents referred to, marked Plaintiff's Exhibit No. 2, were received in evidence.)

The Court: Do you submit it?

Mr. Klinger: We submit it, your Honor.

Mr. Elson: No objection to them. And I take it that the court does not desire to hear further arguments?

The Court: I have heard plenty. It is submitted by both sides?

Mr. Klinger: It is submitted, your Honor.

Mr. Elson: Yes.

The Court: The court finds the defendants, and each of them, guilty on Counts 1, 3, 5, 7 and 9.

And while, of course, they are technically guilty, insofar as the even-numbered counts are concerned, inasmuch as they are dependent upon the same facts——

Mr. Klinger: That is true.

The Court: ——they are found not guilty inasmuch as they may not be found guilty of two offenses which are dependent upon the same facts.

The defendants are found guilty as to Counts 1, 3, 5, 7 and 9, and not guilty as to Counts 2, 4, 6, 8, and 10. [380]

* * *

Monday, November 26, 1951—2:00 P.M.

The Clerk: United States of America v. Woodard Laboratories, et al., No. 21770 Criminal, for sentence.

Mr. Klinger: The Government is ready, your Honor.

The Court: In this matter, the probation officer has requested a week's continuance to complete a pre-sentence report. Is that agreeable to the defendants?

Mr. Elson: That is agreeable.

The Court: It will be continued to December 3rd, at 2:00 p.m.

Mr. Elson: Thank you.

(Whereupon, said matter was continued until Monday, December 3, 1951, at 2:00 o'clock p.m.) [382]

Monday, December 3, 1951

The Clerk: No. 21770 Criminal, United States of America v. Woodard Laboratories, Inc., Dean D. Murphy and John L. Sullivan, for sentence.

The Court: Dean D. Murphy.

Defendant Dean D. Murphy: Yes, sir.

The Court: And John L. Sullivan.

Defendant John L. Sullivan: Yes, sir.

The Court: And who is representing the defendant Woodard Laboratories in this case?

Defendant John L. Sullivan: I am.

The Court: Mr. Murphy and Mr. Sullivan?

Defendant John L. Sullivan: Yes.

The Court: You and each of you were charged in the information of ten counts with violation of the Food and Drug Act. When arraigned on these charges, you entered a plea of not guilty.

You were thereafter tried and found guilty on counts 1, 3, 5, 7, and 9, and not guilty as to counts 2, 4, 6, 8 and 10.

You were permitted to file application for probation and today is the day set for hearing of the application for probation and for sentence.

The court has read the probation report.

Is there any legal cause at to why sentence should not be [383] pronounced?

Mr. Elson: There is no legal cause your Honor. I would like to make a few remarks.

The Court: All right.

Mr. Elson: If your Honor please, I just want to make one correction. The defendants did not file an application for probation. Rather, I think it was that the court asked for pre-sentence investigation. But, be that as it may, there are some things that I wish to call to the court's attention, for your Honor to keep in mind, if you don't already have them in mind, and they are the following:

These people, or the Woodard Laboratories is in this case simply because it happened to be the shipper of the tablets that were involved. They were not the manufacturer nor had anything to do at all with the manufacture.

So, if there was any adulteration in the sense that the product did not have the labeled potency in it, the one who was actually at fault, if that be the case, would be the manufacturer, which was not the Woodard Laboratories.

Now, as far as these two individual gentlemen themselves are concerned, of course, they are in the case because of a decision of the United States Supreme Court which makes those who are the responsible parties, you might say, or managing agents, or what-not, of a corporation, jointly liable with it.

As far as Mr. Murphy is concerned, of course, he did not [384] take the witness stand. There wasn't anything that he could testify to or that he could have said, except that he was president, and he already said that.

As far as Mr. Sullivan was concerned, his testimony was simply to the effect that the product was received.

So, if there was any actual fault here so far as adulteration was concerned, it wasn't with the Woodard Laboratories. Rather, it was with the people on whom they relied and who manufactured the product and shipped it to them.

I might say this, there was a guarantee that was issued under the provisions of the Food and Drug Act, that the Woodard Laboratories had. However, that guarantee was issued by the manufacturer, and that would not be available to these people in this case for the reason that the extent of it was simply that the manufacturer guaranteed that any product such as they manufactured, that went into the final product here, didn't violate the Federal Food and Drug Act, which would be simply the excipients in the tablet.

So far as the estradiol itself was concerned, of course, that was supplied by an Eastern concern and when put in with the excipients, out the window went the guarantee.

Since this matter came up the first part of the year, there was no attempt here to try to gloss things over. As a matter of fact, in the evidence there is in one of the exhibits there a very long

letter which is addressed by the Woodard [385] Laboratories to the Food and Drug Administration, in which they set out the complete history of events and the efforts they had made to try to find out what was wrong with the product and the reports that came out from these qualified experts of unquestioned competence, and I simply want to bring those facts to your Honor's attention, because here we have what I conceive to be a Food and Drug case in which the defendants are only guilty because of the technical aspects of the law, and simply because of that.

In other words, they weren't manufacturers, which is usually the case in a Food and Drug case.

And, because of that, I suggest, your Honor, as to the corporation, a fine be imposed and that it be merely a nominal fine; and as to the two individual defendants, that the judgment rendered by the court make no finding of guilty or any imposition of punishment against them.

The Court: Mr. Klinger.

Mr. Klinger: If the Court please, your Honor has heard the case and all the testimony. There is nothing for me to add with respect to that.

With respect to the facts that the shipper shall represent, that is something which the statute provides and the statute places the responsibility upon the shipper who puts it out into the channels of interstate commerce and derives a profit from it, if it is sold, and therefore assumes the responsibility [386] for it.

If they had had some guarantee with which they

were familiar, the manufacturer may have been prosecuted, but, as it was, they were assuming the full responsibility of putting these very potent drugs into the hands of physicians for the treatment of serious conditions, and when the drugs are below their labeled potency, as these were amply demonstrated to be, serious consequences may follow.

We feel, your Honor, that a substantial fine should be imposed on the corporation, and the Government feels that that should be not less than $2,500.

In respect to the individuals, and it is the individuals who operate the company, are responsible for its policies and its operations, it is the Government's position and it recommends that fines of not less than $1,000 be imposed on each of the defendants, and with suspended sentences, and followed by probation for not less than three years, in the interests of protecting society, which we feel should be imposed.

The Court: What would be gained by probation?

Mr. Klinger: Only for the purpose of seeing to it or having some weapon, something which would make these defendants be very careful about any other drugs that they ever put into the streams of interstate commerce. That is the purpose. That is what we conceive to be the purpose in this case.

Here is a drug manufacturer. They are still in business. [387] They intend to remain in business. They are going to be shipping these drugs interstate. We feel that it would be a useful thing for these men and the company to know that should

they violate the requirements of the Federal Food, Drug, and Cosmetic Act again, there would be some very sure punishment which might follow.

The Court: But, there is a sure punishment. I can't see that probation would help them at all. Of course, the only possible violation of the law which you contemplate that they would be guilty of would be some violation of the Food and Drug Act. You don't need probation for that. They are mature men.

In this type of charge, the court always takes into consideration the fact that there could have been a mistake, just by carelessness, and so forth, but when they come back the second time, it would not make any difference who the judge was, I am pretty certain that they then would be given the limit. So they must know that, and probation doesn't add anything to it. I don't see any reason why individuals in their position in life should be reporting to the probation officer that they are not violating laws, and so forth.

I just don't think that it is the kind of a thing where probation would be helpful.

It is the judgment and sentence of the court, as to the defendant Woodard Laboratories, that the defendant pay a fine [388] of $500 on each of the counts, on five counts, or a total of $2,500.

As to the defendants Dean D. Murphy and John L. Sullivan, it is the judgment and sentence of the court that these defendants pay a fine of $50 on each count, or a total of $250, each. [389]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of January, A.D. 1952.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed February 12, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States Distirct Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain the original Information; Waiver of Defendant's Presence as to Each of the Defendants; Waiver of Jury as to Each of the Defendants; Stipulation; Judgment as to Each of the Defendants; Notice of Appeal; Designation of Record on Appeal; Corrected Designation of Record on Appeal and Application and

Order Extending Time to Docket Appeal and a full, true and correct copy of the Minutes of the Court on May 21, 1951, and November 8, 1951, which, together with original plaintiff's Exhibits 1, 2 and 3, and original defendants' Exhibits A to I, inclusive, and Reporter's Transcript of Proceedings on November 7, 8, and 26, and December 3, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.80, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13th day of February, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By/s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13259. United States Court of Appeals for the Ninth Circuit. Woodard Laboratories, Inc., Dean D. Murphy and John L. Sullivan, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 15, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 13259

UNITED STATES OF AMERICA,
Appellee,

vs.

WOODARD LABORATORIES, INC., et al.,
Appellants.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON THE APPEAL

Appellants hereby state the points upon which they intend to rely on Appeal, as follows:

That there is no substantial evidence contained in the record herein to support the judgments of conviction, or either of them.

Dated February 19, 1952.

Respectfully submitted,

/s/ EUGENE M. ELSON,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 21, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS NEED NOT BE PRINTED

It Is Hereby Stipulated between counsel for the respective parties, as follows:

1. That Exhibits A to J, inclusive, referred to in Exhibit 1 in evidence in the above-entitled matter, comprise the labels of the drugs involved in this case and that the contents of said labels are correctly set forth in the Information filed in this action and that it is therefore unnecessary to print said Exhibits A to J, inclusive, referred to in said Exhibit 1 in evidence herein.

2. That Exhibits 1, 2, B, C, D, E, F, G, H and I, which are material to the consideration of this appeal, need not be printed as Appellants have agreed to file with this Court 12 sets of photostats of said Exhibits.

3. That this Stipulation shall be printed as part of the record in this appeal.

Dated this 21st day of February, 1952.

WALTER S. BINNS,
United States Attorney.

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief, Criminal Division.

By /s/ TOBIAS G. KLINGER,
Assistant U. S. Attorney,
Attorneys for Appellee.

/s/ EUGENE M. ELSON,
Attorney for Appellants.

So ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ HOMER BONE,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed February 25, 1952.

No. 13,259

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WOODARD LABORATORIES, INC., DEAN D. MURPHY and JOHN L. SULLIVAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

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No. 13,259

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WOODARD LABORATORIES, INC., DEAN D. MURPHY and JOHN L. SULLIVAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

I.
STATEMENT OF JURISDICTION.

This is an appeal from judgments of conviction imposed against Appellants following a trial by court after a jury had been waived upon an Information charging them in ten counts with violation of the Federal Food, Drug and Cosmetic Act. [R. 28, 29 and 3.] Appellants will through this Brief be referred to as defendants. The District Court had jurisdiction under 18 U. S. C., Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure, and 21 U. S. C., Section 333(a) over the offenses charged in the Information and this Court has jurisdiction under 28 U. S. C., Section 1291 to review the decision of the District Court.

II.
STATEMENT OF THE CASE.

In Count I defendants were charged with having shipped on August 22, 1949 in interstate commerce from Los Angeles to Denver a number of boxes of alpha estradiol tablets bearing the trade name "Estrocrine" and labeled that each tablet contained 0.022 milligrams or 22 micrograms of alpha estradiol and that at the time of introduction into interstate commerce said drug was adulterated within the meaning of 21 U. S. C., Section 351(c) in that each tablet did not contain the quantity of alpha estradiol represented on the label.

Count II involved the same set of facts but charged misbranding within the meaning of 21 U. S. C., Section 352(a).

Count III charged that between January 20, 1950 and January 24, 1950 defendants introduced into interstate commerce from Los Angeles to Denver the same product and that it was adulterated for the same reasons set forth in Count I.

Count IV involved the same set of facts alleged in Count III but charged a misbranding within the meaning of 21 U. S. C., Section 352(a) by reason of those facts.

Count V charged that defendants shipped between March 20, 1950 and April 13, 1950 the same product from Los Angeles to Denver and that it was adulterated for the same reasons set forth in Count I.

Count VI involved the same set of facts as those in Count V and alleged a misbranding by reason thereof within the meaning of 21 U. S. C., Section 352(a).

Count VII charged that the defendants on July 12, 1949 shipped from Los Angeles to Texas the same product

and that it was adulterated for the same reasons mentioned in Count I.

Count VIII involved the same set of facts as those alleged in Count VII and charged a misbranding by reason thereof within the meaning of 21 U. S. C., Section 352(a).

Count IX charged that between May 15, 1950 and May 25, 1950 defendants shipped from Los Angeles to Colorado the same product adulterated for the same reasons set forth in Count I.

Count X involved the same set of facts as contained in Count IX and alleged a misbranding by reason thereof within the meaning of 21 U. S. C., Section 352(a).

The Information was filed May 8, 1951. [R. 3 to 31.]

Due to the lengthy nature of the testimony, we have placed in the Appendix the detailed Statement of Facts necessary to a proper determination of this appeal with appropriate references to the record. In this Brief we therefore condense those facts, employing for easy reference the same headings appearing in the Appendix and with appropriate references to the pages of the Appendix. Preliminarily, however, there are a ~~new~~ few matters that should be covered before we commence discussion of the facts.

Defendant Murphy is President of Woodard Laboratories, a corporation [R. 22] and defendant Sullivan is General Manager. [R. 67.] Jury trial was waived by all defendants. [R. 22-24.] The trial of this case commenced in the morning of November 7, 1951 [R. 35] and was concluded late in the afternoon of November 8, 1951. [R. 27.]

The Court found each defendant guilty as to Counts I, III, V, VII and IX and not guilty as to the remaining counts which involved the same set of facts, respectively, as those upon which they were found guilty. Having been found guilty on the adulteration counts, the Court was not empowered to convict them upon the misbranding counts involving the same set of facts. (*United States v. Noble* (C. A. 3rd, 1946), 155 F. 2d 315, 318; *Gebhart v. United States* (C. A. 8th, 1947), 163 F. 2d 962.)

The sentences imposed upon the defendants were as follows: Against Murphy and Sullivan each $50.00 on each of Counts I, III, V, VII and IX, or a total fine of $250.00 each. Against Woodard Laboratories, Inc., a corporation, $500.00 on each of said Counts, or a total fine of $2500.00. [R. 28 to 32.] We are informed that the fine against Woodard is the largest imposed under the Food and Drug Act during 1951 against any defendant.

Notice of Appeal was served and filed by each of the defendants. [R. 32, 33.]

Though the name of the drug involved is "alpha-estradiol," it is also frequently referred to as "estradiol." For purposes of convenience, it will hereinafter be referred to as "estradiol." Likewise the word "milligrams" will be abbreviated as mg. and "micrograms" as mcg. also instead of using the full corporate name of Woodard Laboratories, Inc., the corporation will hereinafter be referred to as "Woodard."

Because of its importance in this proceeding, we also include in the Appendix (App. 52) an exact copy of the monograph for alpha-estradiol tablets appearing on page

227
~~277~~ of the Fourteenth Revision of the United States Pharmacopaeia referred to in this Brief as U. S. P. XIV.

Motion for judgment of acquittal was made at the close of the Government's case and the defendants' case [R. 85, 280] though not necessary to raise the question of the sufficiency of the evidence on appeal in view of Rule 52(a), Federal Rules of Criminal Procedure. (*United States v. Renee Ice Cream Co.* (C. C. A. 3rd, 1947), ~~165~~ 160 F. 2d 353, 355.) The trial court attached no importance to the motion because a jury was not impaneled. [R. 84, 85.]

III.
CONDENSED STATEMENT OF FACTS.

(1) The Manufacture and Shipment of the Products Involved.

These products were manufactured by Crest Laboratories of Burbank and the completed products furnished to Woodard, who packaged and shipped them. The estradiol used in the manufacture was delivered to Crest upon order from Woodard by International Hormones of Brooklyn, New York. The orders placed by Woodard with Crest were for quantities of 22 mcg. tablets and 110 mcg. tablets. (App. 1.)

The manufacturing methods employed by Crest Laboratories were according to the standard accepted methods in the pharmaceutical manufacturing field. Lot numbers for purposes of identification were assigned by Woodard to each of the quantities received by them in turn from Crest. The products involved in Counts I, II, VII and VIII bore Woodard Lot No. 497,567. At the time that these were manufactured a work sheet was prepared by Crest and assigned Control No. 2571 and was recevied

in evidence as Exhibit "B." A work sheet was also prepared by Crest for the manufacture of the 110 mcg. tablets manufactured at the same time and assigned Crest Control No. 2570. This work sheet was received in evidence as Exhibit "E." The products involved in Counts III and IV bore Woodard Lot No. 897,618. A work sheet was prepared by Crest for these and assigned Control No. 2800 and this work sheet received in evidence as Exhibit "C." The 110 mcg. tablets manufactured at the same time were assigned Control No. 2803 and the work sheet therefor received in evidence as Exhibit "F." The products involved in Counts VI, VII, IX and X bore Woodard Lot No. 107,694. A work sheet for the manufacture of the 22 mcg. tablets subject of those counts was prepared by Crest and assigned Control No. 3180 and the work sheet received in evidence as Exhibit "D." The 110 mcg. tablets manufactured at the same time were assigned Control No. 3181 by Crest and the work sheet for that batch received in evidence as Exhibit "G."

The 22 and 110 mcg. tablets were manufactured in precisely the same way with the same ingredients and correspondingly the same amounts thereof except of course the quantity of estradiol in the 110 mcg. product was greater than in the 22. (App. 2, 3, 4, 5.)

In the manufacture of all of these products an overage of 5% more estradiol was used than necessary to finish a completed product each containing 22 or 110 mcg. of estradiol as the case may be. (App. 5, 6.)

The manufacturing process was described in detail and involved a series of steps commencing with weighing of the individual ingredients by the supply department, again weighing when received in the manufacture, the mixing

of all of these ingredients in a pharmaceutical mixing machine, together with the estradiol, so that as mixed the entire mass was one homogeneous wet mass. The extrusion of this mix then through another machine, the particles of the mix then extruded resembling macaroni, the granulating of this mass, drying it, and finally its compression into tablets in the tableting machine. (App. 6, 7.)

Upon completion these products were shipped to Woodard, who packaged and shipped them on the dates and to the persons specified in Exhibit 1.

(2) Assays of Samples of the Product Are Made by the F. D. A. and the Results Thereof.

As shown by Exhibit 1, the Stipulation of Facts, samples of the products in each count were picked up and delivered to Jonas Carol of the Food and Drug Administration for laboratory analysis and assay. All of these assays occurred either in the latter part of 1949 or the early part of or up to the middle of 1950. (App. 8-15.) [Ex. 1.]

Two witnesses for the Government testified, both employees of the Food and Drug Administration and men of unquestioned competence. Their testimony amounted to this: that the samples in question were analyzed by them, some according to the U. S. P. procedure and some with deviations therefrom and that the amount of estradiol recovered ranged from approximately 6 to 16 mcgs., depending upon the particular sample assayed. The U. S. P. assay procedure contemplates first a series of four extractions in the method described in U. S. P., the purpose being to extract the estradiol present in the material and then after extraction by use of a colorimeter to estimate the quantity of estradiol actually extracted. We have

attached in the Appendix to this Brief a copy of the monograph for estradiol, or alpha estradiol, tablets appearing in U. S. P. XIV at page 227, which shows the steps to be taken in the assay procedure. (App. 52.)

Following the assays mentioned these men conducted four additional extractions of the samples and did not extract any more estradiol.

Following that they attempted to simulate the tablets in question by using quantities of excipients or materials which they considered were commonly used in tablets of this sort. They did not, however, use all of the excipients present in the Woodard tablets and in one respect used an excipient which was not present in the tablet. Also these excipients were allowed to remain in powdered form and were at no time put through the manufacturing process employed in making the Woodard tablets, nor was the mixture ever compressed into tablet form. The U. S. P. method of assay provides that a tablet containing 22 mcgs. of estradiol shall be used. Therefore if a tablet was represented, such as the Woodard tablets, to contain 22 mcgs., it would be necessary to take 10 tablets for the purpose of assay. Thus in conducting this simulated experiment these men took the equivalent of 9 or 10 of such tablets in powdered form and added 200 mcgs. of estradiol. The U. S. P. assay was run and approximately 97% of the amount of estradiol put into this experimental mixture was recovered. (App. 10-16.)

The witnesses for the Government and the witnesses for the defense (all of whom were experts) were all in agreement up to a certain point; that in assays conducted by them of samples of the Woodard tablets, they were unable to recover the labeled potency of 22 mcgs. The

reasons for this lack of recovery was where the point of difference existed, the inference being from the testimony of the Government witnesses that by reason of their assay results no more estradiol was in these tablets at the time of shipment than they recovered in their assay. The testimony of the defense witnesses on the other hand was that the U. S. P. method of assay is wholly unsuitable and inaccurate for the assay or determination of the infinitesimal amount of estradiol in a tablet such as the Woodard 22 mcg. tablets, and an experiment was conducted by expert witnesses for the defense to prove that to be the case. That, however, will be dealt with shortly in this discussion of the facts.

(3) An Official Assay Method Is Adopted After the Manufacture and Shipment of the Products in Question.

No official assay method for estradiol tablets existed prior to the date that the fourteenth revision of U. S. P. became official on November 1, 1950. That method appeared on page 227 of that work. (App. 16, 18, 52.) All of the products in question here were shipped prior to November 1, 1950; one shipment was on August 22, 1949, another January 24, 1950, another April 13, 1950, another July 12, 1949 and the last May 25, 1950. [See Ex. 1.] Also all of the assays of these samples conducted by the Government witnesses were made prior to the time that the U. S. P. method became official and in some cases before it was known that it would be listed and recognized in U. S. P., or in fact that any method of assay existed. [Ex. 1.] (App. 16, 18, 22, 25, 31.) The Government witnesses, however, were able to follow the procedure that subsequently appeared in U. S. P. be-

cause they had participated in the formulation of the assay method itself and of course knew it long before its appearance. (App. 9, 13, 14.)

(4) The Notices of Alleged Violations to Defendants.

In the early part of 1950 a Notice of Hearing was received by Woodard from the Food and Drug Administration alleging that samples of the products which subsequently became subject of this litigation had been picked up and upon assay shown to be below the labeled potency of 22 mcgs. A hearing was had before the Administration and a couple of months later another hearing having to do with samples of another shipment, which also became subject of the litigation, was had. Following these hearings Woodard contacted the most competent laboratories in Los Angeles, submitting samples of the products picked up by the Administration for assay and obtained a wide variety of results. Correspondence passed between Woodard and the Administration on the subject and Woodard advised the Administration by a letter dated July 17, 1950 [Ex. 2] of the results obtained by these laboratories and stating that the question had therefore been raised whether any method of assay was suitable for the assay of these particular tablets and accurate results obtained. (App. 19, 20.)

(5) Assays of Samples of the Products Are Obtained by Defendants and the Results Thereof.

One of the laboratories retained by defendants was Adam Laboratories of New York. The results of these assays appear in a letter dated December 7, 1950, which is a part of Exhibit 1. This laboratory found the samples assayed to be equal to the labeled potency. Consequently

the deposition of Elizabeth Adam Weiss, the head of this laboratory, was taken in New York City by counsel for defendants in July, 1951. Upon returning to Los Angeles and investigating the matter further counsel for defendants was convinced that her assay results were inaccurate, that the assay results obtained by the laboratories in Los Angeles were true and that the opinion of these laboratories that the U. S. P. method of assay was inaccurate and unsuitable for the assay of these low potency products was the true state of facts. It may not properly be part of a statement of facts to make the following observation but we may do so in order that no wrong impression be obtained: In arriving at this conclusion it was not that counsel or the defendants doubted that the labeled amount of estradiol—22 mcgs.—was actually in the tablets at the time of shipment but rather that it would be impossible for Miss Adam, by following the U. S. P. procedure, to *recover* the labeled potency of 22 mcgs. [R. 97, 302, 303.]

The other laboratories retained by defendants were Shankman Laboratories, Bio-Science Laboratories and Truesdail Laboratories. The results of their assays of samples of the Woodard tablets ranged from 9.1 mcgs. per tablet to 14½. (App. 19, 21.)

Their testimony, with the exception of Truesdail Laboratories, through Dr. Jeffreys, was not offered for the obvious reason that it would all be cumulative and simply establish but one thing, that no more than 14½ mcgs. per tablet of estradiol could be recovered from tablets with the excipient present actually containing 22 mcgs. under the U. S. P. method of assay. (App. 21.)

Dr. C. E. P. Jeffreys, Technical Director of Truesdail Laboratories, one of the largest and most widely known laboratories in Southern California, holds a Ph.D. degree in Chemistry from the California Institute of Technology and possesses the other qualifications appearing in the record. (App. 21.) Prior to July 27, 1950, he had been requested by Crest Laboratories to assay a sample of one of these tablets of the 22 mcg. potency. He refused to do so, however, because at the time there was no acceptable method known for commercial assay of such a low estradiol potency product. About July 27, 1950, however, he received a copy of what was to become U. S. P. XIV. At about that time he was requested by Woodard to run an assay of a sample of one of the Woodard tablets in question and he did so strictly according to the U. S. P. method. Following that method precisely the recovery of estradiol was so low that he felt the difficulty was in lack of complete extraction of the infinitesimal amount of estradiol present in combination with the large mass of excipients (this ratio actually was 22 parts estradiol to 324,000 parts excipients) and in order to obtain better results he used a different grinder or mixer for the grinding up of the tablets than the U. S. P. provided. Even with that procedure he was unable to recover more than 9.5 and 9.1 mcgs. per tablet and he could not duplicate results in several assays attempted. (Government witness Carol conceded that when duplication of results could not be obtained the assay procedure is faulty, other things being equal.) (App. 17.) He explained in detail that organic substances such as estradiol adsorbed to the solid surfaces of excipients and that the extraction of the estradiol from those excipients presents a major problem in the science of analytical chemistry.

(App. 23-26.) He pointed out that a microgram was but one-millionth of a gram and in his opinion all of the estradiol was not extracted because of adsorption such as he mentioned. (App. 21, 22, 24.)

The U. S. P. method he said was a very sensitive and cumbersome method and it was also possible under that method for material to be extracted along with the estradiol which would render the final results inaccurate and, too, it would not be possible to know how much estradiol had been adsorbed by or on the excipients. (App. 25.) We refer the Court to the portion of the Appendix in which Dr. Jeffreys' testimony appears in this connection in detail. (App. 21-28.) We simply hit the highlights of it here for the purpose of bringing before the Court the broad picture of the position his testimony discloses.

Another defense witness was Don C. Atkins, presently working on his doctor's degree at U. S. C. in Chemistry. He was director of laboratories at Crest but was not employed by them at the time these tablets were manufactured. He has conducted approximately 100 assays of estradiol tablets and used a colorimeter for the purpose of finally estimating the quantity of material at the end of an assay over 1,000 times. He testified extensively concerning experiments made by him with the U. S. P. procedure for tablets containing 22 mcgs. of estradiol and he stated that no satisfactory results had been obtained and that the presence of the excipients in the tablet rendered the U. S. P. method inaccurate and unsuitable. (App. 29-37.)

He, as well as Dr. Jeffreys, confirmed the fact that prior to the appearance of the U. S. P. method of assay no method of assay had appeared in the scientific litera-

ture for the assay of tablets containing estradiol in combination with other excipients. This is the substance of his testimony and for a more detailed review of it we refer the Court to that portion of the Appendix in which it appears. (App. 31, 29-37.)

(6) Experimental Assays Are Instructed to Be Made by Defendants and the Results.

At the request of counsel for defendants Crest Laboratories, on June 27, 1951, prepared a work sheet for the manufacture of 7,000 tablets each to contain 22 mcgs. of estradiol. This work sheet was given a control number, No. 2571-B, and was received in evidence as Exhibit "H." It was made identically with the work sheets prepared at the time the products in question were manufactured [Exs. B, C and D], using the same excipients, the same amount of estradiol and the same corresponding quantities. (App. 38, 39.) Responsible officials of Crest Laboratories personally performed each step in the manufacturing process. (App. 39.)

On the same day, using the same work sheet, another batch of tablets was made up in identical fashion but with the estradiol omitted and each step in the manufacture again performed by the same officers. Samples of both batches were sent on the same day to Dr. Robert E. Hoyt at the Cedars of Lebanon Hospital in Los Angeles. We digress for a moment to point out the misconception of the Court as to the nature and probative value of the defense evidence concerning the manufacture of those experimental batches and subsequent experiments, which will be related by Dr. Hoyt in conjunction with Dr. Sobel. These experiments were carried out for the purpose of demonstrating that by following the U. S. P. method

of assay when 22 mcgs. of estradiol per tablet is used in combination with the corresponding great mass of excipients, that small amount cannot be extracted and estimated. The Court ruled such testimony to be inadmissible and we refer to that phase of the case more fully in our argument. This matter was argued at considerable length, the Court stating that he was not interested in any test made at a later time of some experimental tablet even though composed in the same way. It was only after counsel for the Government withdrew his objection that the Court reluctantly admitted the evidence in the record. [App. 38, 39; R. 115-126.] Dr. Hoyt possesses qualifications such as will not usually be found. He has been a teaching fellow and instructor at the University of Minnesota Medical School, instructor in the School of Medicine at U. C. L. A., Director of the Institute of Experimental Medicine, College of Medical Evangelists in Los Angeles. His function at the latter institution was to carry out experimental studies in medicine and related fields, and to supervise and perform laboratory procedures considered too delicate or difficult for average laboratory personnel to carry out properly. Presently he is Assistant Clinical Professor in the Department of Infectious Diseases at U. C. L. A. and during the war he lectured at the U. S. C. Medical School in the Department of Bacteriology and has written and published about 35 papers dealing with scientific subjects, one of which had to do with the evaluation of an assay procedure for a product related to estradiol. (App. 39-41.)

He and Dr. Sobel, also of the Cedars of Lebanon Hospital, worked side by side in the conduct of these experiments, and their full testimony as to the experi-

ments conducted by them appears in detail in the Appendix. We shall simply hit the highlights of it at this point. (App. 41-51.)

Their first problem was to discover how much pure estradiol could be extracted without the presence of excipients in following the U. S. P. procedure and they found that in doing so there was a loss of 27½% of the pure estradiol during the procedure when assayed without anything else in combination with it.

There was introduced into evidence for illustrative purposes a chart prepared by Dr. Hoyt for the purpose of illustrating the experiments conducted. That was received as Exhibit "I."

Next they took a quantity of the experimental batch received from Crest, labeled to contain 23 mcgs. When run by the U. S. P. method it was found that only 10.1 mcgs. of the 23 were recovered. Then after making correction for the known loss of 27½%, a recovery was represented of 13.8 mcgs. instead of 23, or 40% non-recoverable. (App. 41-43.)

Then they took samples of the experimental batch received from Crest which did not contain any estradiol. They ground these up and added a specific known amount of estradiol—20 mcgs. This amount was selected for the purpose of convenience and would make no difference in the final result whether 20, 22 or even 30 mcgs. had been selected. (App. 43-44.)

After these tablets were ground up and the estradiol added and the assay run, they made a recovery of 10.1 mcgs., or 50%. Then after correcting for the known loss of 27½%, the recovery amounted to 13.8 instead of 20, or 31% lost or nonrecoverable in the assay pro-

cedure. It was then his conclusion that some of the estradiol had been held or adsorbed on the excipients. (App. 44.) Carrying the experiment further, he took some of the tablets which contained 23 mcgs. of estradiol, ground them and placed them in what is known as a Soxhlet extracting device and extracted continuously from 12 to 18 hours with ether. This is not a procedure provided for in U. S. P. but he followed this method to see if more estradiol is recoverable than by the U. S. P. method. In so doing he was able to recover more than he had under the U. S. P. method, namely, 16.4 mcgs. (App. 44-45.)

Dr. Hoyt in detail explained the effect of adsorption by excipients on the estradiol. (App. 45-47.) He and Dr. Sobel did not run tests of the residue, as did the Government witnesses, namely, four additional extractions than those called for by the U. S. P. method because the method did not provide for it and they were retained to determine whether the amount of estradiol known to be present could be extracted, not to devise some method of assay which might be suitable. (App. 47.)

We refer the Court to Dr. Hoyt's testimony as it appears in the Appendix for the detailed discussion given by him on the subject of his experiment and his conclusions. (App. 39-48.)

Dr. Harry Sobel, who collaborated with and ran tests in duplicate with Dr. Hoyt, possesses an extensive educational background and experience, his specialty being a group of compounds which go into the making of certain hormones related to estradiol and he has written thirteen scientific papers, eight of which directly or indirectly had

to do with the subject. We refer the Court to that portion of the Appendix in which Dr. Sobel's testimony appears for a more detailed review of it. However, his testimony was largely cumulative of Dr. Hoyt's, with some expansion of it. (App. 48-51.)

IV.
THE QUESTION INVOLVED.

The sole question involved on this appeal is whether as a matter of law all of the substantial evidence in the case is as consistent with a reasonable hypothesis of innocence as with guilt.

V.
SUMMARY OF ARGUMENT.

It is academic that a question of law for the Court of Appeals to determine is presented when it is claimed that the evidence is insufficient to sustain the judgment, or, in other words, when it is claimed that there is no substantial evidence to support the judgment.

Whether there is sufficient evidence depends upon whether all of the substantial evidence is as consistent with innocence as with guilt. By this is not meant that the function of the jury, or a trial court sitting without a jury, to weigh the evidence and judge the credibility of the witnesses shall be in the leastwise impaired.

Substantial evidence has been defined by the Supreme Court in *N. L. R. B. v. Columbian Co.* (1939), 306 U. S. 292, 300, to be:

> "* * * more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion. * * *"

Unimpeached credible evidence may not be disregarded by the trier of the facts in arriving at a verdict or judgment.

It is the unqualified position of the defendants in this case that there is no substantial evidence in the record consistent with any reasonable hypothesis but that of innocence. It is the defendants' position also that at the very most there exists no more than a mere suspicion that the products involved were adulterated and misbranded—below their labeled potency. This suspicion itself cannot even exist unless one is led to suspect that by reason of the Government's assays the products in question were below their labeled potency at the time of shipment and it is at the time of shipment that the offense was created or it never existed. The evidence of the Government was simply that they had assayed certain samples of the products involved under the U. S. P. method and did not recover the labeled potency; that they then deviated and made four additional extractions than those called for by U. S. P. and were unable to recover any estradiol; that they then added 200 mcgs.—10 times the labeled potency of these products—to the residue and attempted to extract it and recovered approximately 97% of that put in; that they then attempted to simulate the tablet in question but did not use the same ingredients, used one ingredient that was not even in the Woodard tablets, never followed the elaborate manufacturing processes involved or any process to complete a tablet in finished form and then simply taking the powdered substance, added 200 mcgs. of estradiol and were able to recover it.

This testimony simply assumed that by composing the ingredients in the form above mentioned a product equal to the Woodard tablets would be the result. Then they asked the Court to presume that the tablets in question did not contain 22 mcgs. each of estradiol at the time of shipment.

On the other hand we have the undisputed testimony, corroborated by the uncontradicted work sheets used in the manufacture of the Woodard tablets showing precisely the ingredients contained therein, the amounts, including the estradiol, in which case 5% more estradiol was used than called for to make tablets of 22 mcg. potency. In addition to this, it was conceded by the Government witnesses that estradiol does not lose its potency by lapse of time or being subjected to heat, in other words, it is stable. The experts for the defense were in agreement with the experts for the Government that from tablets, such as these, mixed in combination with the great mass of excipients, no more than approximately 14 mcgs. were extracted by the U. S. P. method.

Having already shown by uncontradicted evidence that the labeled amount of estradiol was in the tablets at the time of shipment, the defendants went further and by experiments which remain uncontradicted, showed that tablets made in precisely the same fashion as the Woodard tablets, with the same ingredients and in the same amounts, did not permit recovery of the labeled potency of 22 mcgs. even though Dr. Hoyt, who conducted the experiment himself, placed in the tablets 22 mcgs. of

estradiol. Dr. Hoyt showed without contradiction that even after correcting for a known loss that he demonstrated would occur, 30% of estradiol that he had placed in the tablets was not recoverable under the U. S. P. method.

In addition to the foregoing, the Court misconceived the applicable principles of law. First, it gave no probative value whatever to Dr. Hoyt's experiment because it happened to be an experiment of tablets prepared for that purpose at a time subsequent to the shipment involved notwithstanding the fact that these tablets were made as above stated. There can be no escape from this conclusion as it appears in the record itself and is more fully referred to in the argument which follows. Secondly, the Court was of the belief that if the defense position was that the U. S. P. method—even though it was the official method—was not accurate, the burden was upon the defendants to devise some test or assay method which would be suitable, entirely overlooking the fact that *the burden was upon the Government* to prove that by the U. S. P. method of assay the full amount of estradiol in such tablets could be assayed correctly.

The evidence in the case permits of only one conclusion and that is that the tablets involved contained the labeled potency at the time of shipment and that the U. S. P. method of assay, which is the official method, did not permit recovery of all of the estradiol present and that in reaching the conclusion that it did the Court erroneously applied principles of law which were vital to a proper determination of the case.

VI.
ARGUMENT.

(1) There Is No Substantial Evidence in the Record Consistent With Any Hypothesis but That of Innocence.

A question of law for the Court of Appeals to determine is presented when it is claimed that there is no substantial evidence to support the judgment or, said in another way, that the evidence is insufficient to sustain the judgment.

This of course is not the same thing as saying that the evidence for the defendants outweighs the evidence of the Government for it is academic that the weight of the evidence and the credibility of the witnesses is for the trier of the facts to determine. It is only when it is claimed that there is no substantial evidence to support the judgment that a question of law is presented.

Under the authority of countless cases, whether the evidence is sufficient to sustain the judgment depends upon whether all of the substantial evidence is as consistent with a reasonable hypothesis of innocence as with guilt. We shall cite only a few of the cases in support of this proposition. This principle, however, has been recognized by all of the circuit courts, later the courts of appeal, including this Court.

Isbell v. United States (C. C. A. 8th, 1915), 227 Fed. 788, 792;

Karn v. United States (C. C. A. 9th, 1946), 158 F. 2d 568, 570;

McCoy v. United States (C. C. A. 9th, 1948), 169 F. 2d 776, 783, 786.

The definition of substantial evidence was stated by the Supreme Court in *N. L. R. B. v. Columbian Co.* (1939), 306 U. S. 292, 300. (See p. 18 *supra.*)

There is another principle which is academic, that unimpeached credible evidence may not be disregarded by the trier of the facts. (*Texas Co. v. Hood* (C. C. A. 5, 1947), 161 F. 2d 618, 620); *Cruse v. Union Central Life Insurance Co.* (D. C. E. D. Tex. 1945), 59 Fed. Supp. 504, 506.)

An excellent statement of the rule is also found in *Chan v. T. I. & T. Co.* (1945), 107 Adv. Cal. App. 615, 620.

> "It is the general rule that the trier of fact cannot arbitrarily disregard uncontradicted, entirely probable testimony of an unimpeached witness. (*Mantonya v. Bratlie,* 33 Cal. 2d 120, 127 (199 P. 2d 677); *Fidelity & Casualty Co. v. Abraham,* 70 Cal. App. 2d 776, 782 (161 P. 2d 689).) Testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true by the trier of fact. (*Dobson v. Dobson,* 86 Cal. App. 2d 13, 14 (193 P. 2d 794).)

The credibility of the witnesses involved in this case is not an issue. Up to a certain point the experts for the Government and those for the defense were in agreement. They were in agreement that in assays conducted by them under the U. S. P. XIV method the labeled potency of 22 mcgs. was not *recovered.* The amount actually recovered by the Government experts ranged from 6 mcgs. to 16. The amounts actually recovered by the defense experts, following the same method, ranged from 9.1 mcgs. to 14½. They were not in agreement, however, as to

the reason for this small recovery. The inference from the testimony of the Government experts was that the small recovery was due to the fact that there was no more estradiol in the tablets at the time of shipment than the amounts recovered by them. The experts for the defense, on the other hand, testified that in their opinion the reason for the small recovery by them was the presence of such an infinitesimal amount of estradiol in the presence of such a tremendous mass of excipients, the ratio being 22 to 324,000 and that a quantity of the estradiol sufficient to make that difference became adsorbed onto the solid surfaces of the excipients and that it simply was not extractable under the U. S. P. method. Had this been the extent of the testimony it would have amounted to no more than a conflict and no question of law would have been presented to this Court. However, the evidence went farther.

The witnesses for the Government were men who had participated largely in the formulation of what became known as the U. S. P. XIV assay method for estradiol tablets, which method became official for the first time November 1, 1950. In an effort to demonstrate the accuracy and applicability of this method of assay to a product such as this, they conducted four extractions *additional* to those provided by the U. S. P. method, the purpose being to try and recover all of the estradiol present in the mass and were unable to recover any more. (App. 14.) This of itself of course *does not prove that the estradiol was not there* or that the extraction method was effective to extract all of it. With respect to the products involved in Counts V and VI, Dr. Banes, a Government witness, testified that the recovery was so low that he ran a further test with a Soxhlet device and recovered no

more estradiol. (App. 14.) This, however, simply confirms the testimony of Dr. Hoyt, the defense witness, that even with the Soxhlet device which he used in connection with the tablets in which he had placed a known amount of estradiol, there was *30% less recovery than he himself had placed in the mixture.* Then as to Counts VII and VIII, Dr. Banes testified that after making 4 extractions called for by the U. S. P. method, and 4 additional ones, he added to what was left 200 mcgs. of estradiol and recovered 97% of it. (App. 15.) This, however, is no proof at all that had he simply put in 22 mcgs., the amount involved in the tablets here, he could have *recovered* it and this is in the face of the testimony of Dr. Hoyt who did exactly that and was unable to recover more than 70% of what he had personally put in.

Finally, the Government simulated tablets in powdered form containing some but not all of the ingredients contained in the tablets in question, using an amount to correspond to the average weight of the tablets in these samples; used ten times that quantity to correspond to the tablet provided for in the U. S. P. assay method and then added 200 mcgs. of estradiol. (App. 15, 16, 18.)

It is true that in the simulated experiment conducted by the Government experts they said that they were able to recover the 200 mcgs. that had been placed in the powdered mixture. This testimony is far from being evidence that the tablets involved here did not contain the labeled amount of estradiol or that the U. S. P. assay method is suitable and accurate for the assay of them.

In the Government assay the same ingredients were not used, for instance, magnesium stearate instead of sterotex.

Also all of the ingredients used in the Woodard tablets were not used in the powdered mixture made up by the Government. Then the Government's mixture remained in powdered form and was never compressed into a tablet or carried through the manufacturing process necessary to produce a finished tablet. These processes were many and varied. First they were mixed in a standard pharmaceutical mixing machine and wet granulated to the point that a material of suitable mesh in density was prepared. This wet mass was then extruded and fed on tracings to dry. [R. 113, 114, 147.] Once the mass is wet it is withdrawn and put through a granulator, a machine that produces an extrusion resembling macaroni. The extruded material is then placed upon trays and put in a drying oven. It is then withdrawn and ground through a Stokes oscillator, which forces the granules or extrusions through a screen to produce the granulation of a definite mesh. Then it is again introduced into a mixer and mixed, at which point additional materials, lubricants, are added, well mixed, the material withdrawn and put onto rotary type tablet presses. The material falls into the cavity of a die where two punches are made to come into the die entrapping the material between the two punches and pressure is applied which forms the tablet. [R. 147, 148.]

When it is remembered that the witnesses for the Government and the defendants both conceded that when estradiol came into contact with solid surfaces a molecular change took place by which the estradiol became adsorbed on the solid surfaces of the excipients, it is of the utmost importance from any determinative standpoint in simulating a product such as the one involved not only to use exactly the same ingredients in the same quantities as those used in the manufacture of the Woodard tablets

but as well to put the simulated product through exactly the same manufacturing steps as the Woodard tablets. Without that being done, the conclusion following from the simulated experiment does not and cannot constitute "substantial evidence."

It simply amounts to using something different and doing something different than was done with the manufacture of the Woodard tablets and presuming, without any supporting testimony, that the difference was immaterial. Certainly this evidence of the simulated experiment of the Government cannot be considered substantial and inconsistent with any hypothesis of innocence in view of (1) the uncontradicted testimony of Galindo as to the constituents of the Woodard tablets, supported by the very work sheets from which they were manufactured showing the exact quantities that were used, all of which made up a tablet containing 22 mcgs. of estradiol plus a 5% overage, and (2) the uncontradicted testimony of Drs. Hoyt and Sobel wherein they used not a mere simulated powdered mixture, but a tablet made from the same work sheets as were the originals and which tablet contained exactly the same constituents in exactly the same amounts and made exactly in the same way as the ones in question, to which these doctors added an amount equal to 22 mcgs. of estradiol per tablet, assayed it according to the U. S. P. method, and recovered but approximately 70% of the amount known to be put in.

It is true that the admissibility of experiments lies largely within the discretion of the trial court but, even though admitted, does not render it "substantial evidence" or that which is beyond mere suspicion. (See *N.L.R.B. v. Columbian, supra,* p. 18.) Here the Government's experiment was vastly different than that attending the

manufacture of the Woodard tablets. The Government's experiments simply *presumed* that when the mixture was made up by its experts, it would be the same as the Woodard tablets. From this presumption the Court was asked to presume or infer something else; that therefore the U. S. P. method was accurate for the Woodard *tablets* and that the Government's assay results showed them to be below the labeled potency and that they were therefore below that potency at the time of shipment. This is no more than presuming one fact and then basing another and other presumptions on it. As said in *Texas Co. v. Hood, et al.* (C. C. A. 5, 1947), 161 F. 2d 618, 620, quoting from another case:

> " 'Neither the pleadings nor the proof can be left open to conjecture and guesswork. A presumption of a fact cannot rest upon a fact presumed.' "

The mixture made up by the Government, as we have said was not the same as the Woodard tablets. It had one constituent not contained in the latter and omitted other constituents contained therein. In addition, it remained in powdered form and was never put through the elaborate manufacturing process by which a compressed, finished tablet is made. This process of course is extremely important in that the more constant contact between the estradiol and the excipients the more adsorption takes place and consequently the difficulty of extraction in the assay procedure increased.

We wonder why the Government conducted these tests in addition to the U. S. P. method. If, as their experts would have the Court believe, that method was the most accurate in existence (App. 17), seeking to justify that method seems to indicate doubt in their minds as to its

accuracy when applied to a 22 mcg. tablet, otherwise they would have relied on the official method as being not only the legally recognized method but as well that which they said was the most accurate for the assay of any estradiol tablet.

There has never been any contention by defendants that the U. S. P. method of assay was not suitable or accurate for a tablet containing 200 or 220 mcgs. of estradiol. The defense theory was simply that it was wholly unsuitable, inaccurate and meaningless when it came to assaying for estradiol content a tablet containing 22 mcgs. of estradiol in combination with a large bulk of excipients of the kind and quantity contained in these tablets.

At the outset there exists the testimony of Mr. Galindo of Crest Laboratories, the manufacturer of the tablets. Through him the work sheets used in the manufacture of these products, Exhibits B, C and D, were introduced. His testimony remained uncontradicted and unimpeached that these tablets were manufactured according to standard pharmaceutical practices in the manufacturing field and that the materials shown on the work sheets in the corresponding quantities as shown thereon were used in the manufacture of these tablets and that a 5% overage of estradiol was used. The Government conceded by its own witnesses that estradiol does not lose its potency by reason of lapse of time or being subject to heat. The uncontradicted fact then remained clear through to the end of the trial that estradiol, a stable product, in an amount 5% more than was necessary to equal 22 mcgs. per tablet was used in the manufacture of these tablets. Necessarily in rendering its judgment the Court ignored this evidence which it was not at liberty to do.

This uncontradicted testimony was conclusively proved by the work sheets themselves, Exhibits B, C and D, which show what went into the manufacture, and how much.

It is academic that uncontradicted, credible evidence may not be disregard by the trier of the facts. In *Texas Co. v. Hood* (C. C. A. 5, 1947), 161 F. 2d 618, 620, the Court said, quoting from another case:

> " 'Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; Winn v. Consolidated Coach Corporation, 6 Cir., 65 F. 2d 256; citing cases.'
>
> "See Bonner v. The Texas Co., 5 Cir., 89 F. 2d 291; Cruse v. Union Central Life Insurance Co., D. C., 59 F. Supp. 504; Mutual Life Insurance Co. of New York v. Sargent, 5 Cir., 51 F. 2d 4; Deposit Guaranty Bank & Trust Co. v. United States, D. C., 48 F. Supp. 369; and Stone v. Stone, 78 U. S. App. D. C. 5, 136 F. 2d 761."

As heretofore stated and as appears in the Statement of Facts in the Appendix, concurrently with the manufacture of the 22 mcg. tablets, there were manufactured for Woodard by Crest quantities of 110 mcgs. tablets and the work sheets used in the manufacture of the latter were received in evidence as Exhibits E, F and G. With both the 22 and 110 mcg. tablets exactly the same ingredients from the same containers and in the correspond-

ing amounts were used and this includes as well the estradiol itself. No claim has been made by the Government at any time that the 110 mcg. products were below the labeled potency. This fact is important for this reason: It certainly may be assumed that if there had been any question about the potency of the 110 mcg. product a charge would likewise have been made against it. The defense theory as it appears throughout the record was that the U. S. P. method of assay may be effective in the assay of tablets of a higher potency such as a 110 mcg. tablet or one containing the equivalent or 200 mcgs. mentioned in U. S. P., but that the assay method is not in any sense accurate or suitable when it comes to the assay of a product containing but 22 mcgs.

The results of the tests conducted by the Government witnesses amounted simply to this: That they recovered no more than the amounts to which they testified. Whether any was left behind and was not extracted and therefore not possible of estimation at the end of the assay they did not know and the matter rested simply in their opinion that they extracted all that there was to extract. This involved wholly unwarranted assumptions. On the other hand, Dr. Hoyt, using tablets prepared in identically the same fashion as those in question, with the same ingredients and exactly the same amounts, found that there was unextractable 30% of what he had personally put into the tablets, all for the purpose of finding out whether the U. S. P. method would permit recovery of 22 mcgs. in combination with the excipients involved. Lastly, the uncontradicted evidence of Mr. Galindo, and as shown by Exhibits B, C and D, is conclusive that the labeled amount was actually put in the tablets *and there at the time of shipment.*

Under this evidence, therefore, the conclusion is inescapable that there was no substantial evidence that the Woodard tablets were below the labeled potency as charged, but on the other hand all of the substantial evidence pointed unerringly to the fact that these tablets were manufactured with the required amount in them and that the U. S. P. method of assay is wholly unsuitable and inaccurate for the assay of a *tablet* containing the constituents that these had and but 22 mcgs. of estradiol per tablet.

(2) The Trial Court Misconceived and Misapplied Certain Controlling Legal Principles.

(a) The Trial Court Considered the Evidence of Drs. Hoyt and Sobel to Be of No Evidentiary Value.

During the testimony of Mr. Galindo and preparatory to laying the foundation for the experiment conducted by Drs. Hoyt and Sobel with tablets identical to the ones in question and into which they placed a quantity of approximately 22 mcgs. of estradiol, counsel for the defendants asked Mr. Galindo concerning the preparation of a work sheet for these experimental batches, one prepared with the estradiol included and one prepared the same way but with the estradiol omitted. At this point the work sheet prepared by Crest Laboratories and Mr. Galindo for that purpose was offered into evidence as Exhibit "H" and bore a control number assigned for that purpose of 2571-B. This offer was objected to on the grounds that it was of something done subsequent to the manufacture of the tablets in question, presumably made up and sent out for analysis, all of which would have no probative value. This objection was sustained and the admissibility was argued by defendants' counsel, pointing out that it was not in-

tended to develop through Mr. Galindo the assay results of someone else but simply to lay the foundation by showing the manufacture of the tablets and then the result of the assay would be testified to by the person who made it. This discussion consumes pages 114 to 127 of the record. In connection with this the Court said on page 117, in sustaining the objection and speaking to defendants' counsel:

> "Even under your theory, while of course, you might offer expert testimony here of other chemists and as a basis for their opinion they might state that they had made such investigation and such tests, *that does not mean that they are admissible in evidence.* I assume that you are arguing that they have made some." (Italics supplied.)

On page 119 of the record, in referring to tests made of tablets prepared subsequent to the ones in question, and for the purpose of testing the validity of the U. S. P. method, the Court said:

> "But, you see, as I stated before, as far as this test is concerned, that they have made, this witness takes the stand and apparently has testified as to the amount of alpha estradiol that was placed in the particular tablets that are here in question.
>
> "Mr. Elson: That is right.
>
> "The Court: *But it doesn't go to prove the amount of alpha estradiol that was in the tablet itself at the time of shipment,* in other words, the question that we have to determine here, because of course the Court is faced with this position, if his testimony that that ingredient was placed in there is conclusive of the fact that it was in there at the time of shipment—
>
> "Mr. Elson: I do not mean that. That isn't my purpose.

"The Court: Well, at any rate, the point of course is that the only place where the testimony has any value is where the expert himself testified. You say you are going to call these exhibits." (Italics supplied.)

Here the Court was stating that the uncontradicted testimony of Mr. Galindo that the requisite amount of estradiol was placed in the tablets at the time of manufacture, and as further shown by the work sheets had no probative value to show that it was there at the time of shipment and that the only way in which this fact could be shown would be by testimony of experts. This misconception of the evidence was vital for it was testified and conceded by the Government experts that estradiol is a stable product and does not lose its potency by lapse of time or by being subjected to heat. Therefore under the evidence the fact remained uncontradicted throughout the entire trial that the requisite amount was put into the tablets at the time of manufacture from which it necessarily followed that it was in there at the time of shipment and for that purpose no testimony of an expert was necessary to show that it was there.

Coming back to the foundational examination on page 120 of the record, the Court stated that Mr. Galindo could testify as to the ingredients used in these experimental tablets but that:

"The mere fact that someone wanted him to make a test—and apparently that is the background of this here, to establish that he was requested by someone to make a test, who made out a work sheet, and it isn't necessary for him to put the work sheet in—*doesn't mean a thing.*" (Italics supplied.)

On the contrary it meant everything for it was the documentary proof prepared at the time that the batch was made, of the constituents of the tablets placed in the experimental batch as well as their quantities! It would be one thing for a witness to simply testify that certain chemicals had been placed in a mixture and in certain amounts and quite another thing for that witness to have ready for introduction into evidence the documentary proof that it was done.

Continuing in this discussion counsel for defendants pointed out that these tablets were delivered to an expert for analysis for the purpose of determining the amount of estradiol in them and, if so, how much. With regard to the test of the expert the Court said on page 121:

> "The Court: *Well, I am not interested in his test, I am not interested in a test of some subsequent tablet which was made, because it is not material here.* If he has made a test of these particular tablets and then he is going to testify as to these particular tablets, as has been done by the chemists who have testified here now, of course that goes to the question as to what was in those particular tablets. If he did not have and has not made a test of those particular tablets, if he is an expert that is going to testify here and not because someone told him there was a certain thing in a tablet, if he merely took a tablet and made an examination and analysis and tests with that particular tablet, his testimony, *as far as his testimony is concerned, would be entirely immaterial, because it is a different tablet.*" (Italics supplied.)

Following this discussion an offer of proof was made and objection sustained to it. Whereupon counsel for the Government undoubtedly realizing that the exclusion of

this offer of proof would constitute reversible error, withdrew his objection.

The foregoing demonstrates by the cold record itself that in the mind of the Court the assays made by Drs. Hoyt and Sobel of the experimental tablets were of no evidentiary value whatever.

It is true, of course, that a trial court is presumed to apply the correct principles of law but when the record shows exactly the contrary, this presumption falls to the ground.

In *United States v. Forness* (C. C. A. 2, 1942), 125 F. 2d 928, the court said at page 942:

> "* * * The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts."

In *Todorow v. United States* (C. C. A. 9, 1949), 173 F. 2d 439, the court said at page 448:

> "Clearly, no one incident is sufficient to warrant reversal, and to determine whether, in the aggregate, they adversely affected the substantial rights of the appellants, it is necessary to consider them in their natural and proper setting, namely, the entire record."

In *Fotie v. United States* (C. C. A. 8, 1943), 137 F. 2d 831, the court said at page 839:

> "Ordinarily in the trial before a court without a jury, the presumption is that the judge discards immaterial evidence, but that presumption must yield to a showing to the contrary."

It is plain from the foregoing that by the very statements of the Court, the testimony of Drs. Hoyt and Sobel was accorded no probative value at all. This testimony of course was not for the purpose of establishing that 22 mcgs. of estradiol were in the tablets involved *at the time of their shipment,* but rather to show that a tablet of such a low potency and containing the excipients that it did and their respective amounts as shown by the work sheets, did not permit a recovery of all of the estradiol present and therefore the U. S. P. assay was unsuitable and inaccurate and it is obvious that this substantial evidence of the defense was ignored by the Court in deciding the case and having been ignored erroneously, requires a reversal of the judgments.

(b) The Trial Court Erroneously Adopted the View That Any Method of Assay, Whether U. S. P. or Not, Was Admissible and Valid.

During the final argument, counsel for the defense called the Court's attention to Section 501 (b) of the Federal Food, Drug and Cosmetic Act (21 U. S. C., 351 (b)) stating that under that section when a drug becomes recognized in an official compendium, such as U. S. P., and provides a method of assay for that drug, that assay and that alone is the only one that can be considered as having any evidentiary value. The Court stated that he had examined that section and did not see what difference it made and that the most effective way for the defendants to defend their case and show that the U. S. P. method was not suitable was by showing that there were 22 mcgs. in the tablets in question. [R. 305, 306.] During the course of the argument the Court also pointed out that he had asked Dr. Hoyt whether if the tablets had been

submitted to him for analysis they could have been accurately assayed as to the number of micrograms in them. [R. 304, 305.] Dr. Hoyt, during this questioning, stated that he was sure it could be done perhaps by a biological method of assay, which, however, is not the U. S. P. method. This misconception by the Court of what was permissible proof under Section 501 (b) of the Federal Food, Drug and Cosmetic Act (21 U. S. C., Section 351 (b)) involving, as it necessarily did, on whom the burden of proof rested, was a vital misconception which led the Court to rule that the defendants, having not introduced evidence of some assay, whether it was U. S. P. or not, showing that the tablets in question had 22 mcgs. in them, amounted to a failure of proof.

Under the very terms of 21 U. S. C. 351 (b) a drug is misbranded if it is a drug that appears in an official compendium and its strength falls below the standard set forth in such compendium, and the determination as to its strength or quality shall be made according to the method of assay set forth in that compendium. All of Section 351 (b) appears in the Appendix. (App. 56, 57.)

We have here, then, the fact shown by the record that for the first time the drug in question, alpha estradiol tablets, was recognized and appeared in an official compendium, namely U. S. P. XIV, on page 227, which became official November 1, 1950. The drugs in question were manufactured before that time. The assays conducted by the Food and Drug Administration of the products in question were made before that time. However, the Information here was filed May 8, 1951. [R. 21.] Therefore for a period of seven months prior to the filing of the Information the drug in question was recognized in U. S. P. and a method of assay provided.

It will be recalled that prior to the adoption of the U. S. P. method no method of assay for estradiol *tablets* had appeared in any official publication or in any of the scientific literature. In fact, Dr. Jeffreys of Truesdail Laboratories, one of the best known laboratories in Southern California, stated that prior to July 1950 he had been requested to run an assay of samples of the tablets involved, by Crest Laboratories and had refused to do so because no assay method had appeared up to that time for such tablets of such low potency. In July 1950 he had received his advance copy of the U. S. P. XIV which contained a method of assay and then proceeded to conduct the assays to which he testified. There had previously appeared what was known as the Kober method of assay but this method was for the assay of pure estradiol alone not in combination with any excipients and obviously, therefore, not suitable to the assay of a tablet.

A U. S. P. method of assay existed at the time of the filing of the Information and consequently at the time of trial whether or not the drugs in question were below their labeled potency or not could only be determined from a legal standpoint by the U. S. P. method and not some other. The burden was on the prosecution, therefore, to show that at the time of shipment of these products in August 1949, July 1949, January 1950 and April 1950, these drugs were below their labeled potency of 22 mcgs. and this determination could only be made by the U. S. P. method even though it was adopted subsequent to the dates of shipment. It cannot be said that because no official

method existed at the time of shipment *any* method of assay would be relevant to determine the question as the following analysis will disclose.

The Information did not charge a violation of 21 U. S. C., Section 351 (b) but of 351 (c). Under Section 351 (b) (App. 56, 57) a drug is adulterated if at the time of shipment it is recognized in U. S. P. and its strength, according to the U. S. P. assay method, is below the labeled potency. Under Section 351 (c) (App. 56) a drug is adulterated "if it is not subject to the provisions paragraph (b)"; that is, is not recognized in U. S. P. and its strength differs from that which it is represented to possess. A drug which is not recognized in U. S. P. and consequently no assay method provided may be assayed by any method selected. It could not have been charged that Section 351 (b) had been violated if the drug at the time of shipment was not listed or recognized in U. S. P. Therefore the situation presented here is a drug which is not "official" at the time of shipment becoming official seven months before the Information is filed and an official assay method for the first time then appearing. The question, then, is: At the time of trial may the question of adulteration or misbranding be determined by employing any assay method other than the official method?

It must be assumed, and the Government witnesses in fact testified, that the U. S. P. method was selected as the most accurate and suitable for estradiol tablets (App. 17.) It should be noted that 21 U. S. C., Section 351 (b) (App. 56, 57) provides that if the Food and Drug Administra-

tion is of the view that an assay method selected by the U. S. P. Revision Board is not suitable or accurate it shall bring that fact to the attention of the Board and if the Board does not make the change then the Food and Drug Administration by regulation can. No such regulation has at any time been adopted. Repeating, therefore it must be assumed that the U. S. P. method of assay was considered by the U. S. P. Revision Board and the Administration as the most effective assay method for such tablets as of and for several months prior to November 1, 1950.

An assay method, however, is merely a *means to determine whether a drug contains what it is represented to contain* and the basic question here is whether the drug involved contained 22 mcgs. of estradiol in each tablet at the time of shipment. *The question is not whether one assay method is more accurate than another.* 21 U. S. C., Section 351 (b) specifically provides that when an assay method is recognized in U. S. P. it is the official method and the question determined by following that method alone.

To say that the U. S. P. assay method does not apply to a drug shipped before its adoption and only applies to a drug shipped after its recognition in U. S. P. defeats the Federal Food, Drug and Cosmetic Act itself. This would necessarily mean that the U. S. P. method must be followed as to drugs shipped after its adoption but not to drugs shipped before; that it is accurate as to the former

but not the latter; that it is accurate and acceptable as to a drug shipped at one time and not as to one shipped at another. If of any value at all the U. S. P. assay method must be controlling as the method of assay to be used from the time of its adoption as to any such drug which is to be assayed regardless of when shipped.

Whether the drug was below the labeled potency at the time of shipment has nothing to do with the assay method employed. The drug was or was not below that potency at the time of shipment regardless of the assay method.

If a drug was shipped before the U. S. P. assay method was adopted and assayed by some method selected by the chemist and found to be equal to the labeled potency, and then the U. S. P. method became official and the drugs assayed by that method and found below the labeled potency the latter would necessarily control because it has been adopted as the official and best and only method for the determination of that question. The difference between the two results could have no more legal effect upon the question of adulteration than this: That at the time of shipment the shipper believed, and had reason to believe, that the drug was not adulterated. His belief or intent, however, is immaterial and the U. S. P. method of assay being the official method for determining the question of adulteration would necessarily control.

If some method other than the U. S. P. were relevant because the drug was shipped before it was recognized in U. S. P. and this other method showed the drug to be above its labeled potency but then the U. S. P. method

became official and an assay under it showed it to be below labeled potency, then in order for the former test to control it would of necessity have to be accepted that it was more accurate than the U. S. P. test to determine the question itself. This might seem to work an injustice on one who before shipment assayed a drug under a method then existing and found it to be equal to its labeled potency but, as we have said, an assay method is only a means of determining a fact and if the U. S. P. method is to be of any value at all it must be taken as the accepted and only method to determine that fact, whether or not the time of shipment was before the drug became official or not. Such a situation would warrant, and possibly would require a fair-minded prosecutor to dismiss the action, or the Court to impose a mere token fine. If this analogy were not true, then we would find ourselves in this impossible situation: In one court room a person could be tried for shipment of a drug made before it was recognized in U. S. P. and any assay method would be admissible to determine the fact of adulteration or misbranding, whereas in the next court room, and being tried at the same time, would be a person who had shipped after the drug was recognized in U. S. P., in which case only the U. S. P. assay method would be admissible to determine the very same fact. Hardly could it be said that the U. S. P. method would be accurate for goods shipped at one time but not accurate as to goods shipped at another. If the U. S. P. method would not be valid in one case but would in another, then it could hardly have any valid basis for conviction in any case.

Any deviation from the U. S. P. method simply would not be that method. It could have no more validity than if made of a drug shipped after the method became official, for if such were the case then in any litigation on the subject the defendants would be enabled to show, and conversely the Government, that a drug was adulterated or not by reason of some assay method other than that provided by law.

It therefore necessarily follows that the one method of assay by which the question of potency could be determined was by the U. S. P. method of assay and that method alone.

The Court completely misconstrued the meaning and effect of 21 U. S. C., Section 351(b), and took the view that because Dr. Hoyt stated that he probably could assay these products correctly by some method other than U. S. P., he should have done so. This, therefore, simply amounted to placing upon the defendants the burden of devising an assay method which would be suitable for the assay of these products and which was not the U. S. P. method. Certainly no such burden existed or could exist.

The trial court confused the effect of the U. S. P. method upon the question before it in another particular as follows: At the opening of the defense argument, the Court stated that [R. 301]:

> "The question in the mind of the court is the absence of any testimony on the part of the defendants as to assays made by the defendants to determine the amount of alpha estradiol in these tablets."

The entire defense theory and all of its evidence was directed to the fact, first, that the requisite amount of estradiol had been placed in these tablets at the outset as shown by the testimony of Mr. Galindo and the work sheets and that the U. S. P. method of assay was unsuitable and inaccurate and determined nothing so far as these tablets were concerned. Obviously, the defendants were unable to present any assays made of *these tablets* showing the labeled potency to be in them because the U. S. P. method of assay could not and did not show it! It is true Dr. Jeffreys testified as to the amount that he recovered in his U. S. P. assay of some of these tablets and he stated the amount recovered was approximately 9 mcgs. as against a labeled potency of 22. But he stated that in his opinion all of the estradiol was not extracted and gave extensive reasons why. Further defense testimony was to the same effect, concluding with the experiment of Drs. Hoyt and Sobel that the legal method of assay—the U. S. P.—simply could not determine the amount of estradiol in these tablets. Again on page 304 of the record, during the argument, the Court specifically stated that the most effective way to prove that the U. S. P. method was not suitable and that the tablets in question contained the labeled potency was "to have men testify who used other systems, who, after making analyses, would tell you, for instance, that there were 22 micrograms in that tablet."

The Court here was of the erroneous view that the burden was upon defendants *to discover some method of assay* that would be suitable for these products so that

they could come into court and testify that they had discovered this method and by using it showed the required amount in the tablets. As we have said, there was no method known in the scientific literature for the assay of estradiol tablets of this potency and there was no method of assay at all for estradiol tablets appearing prior to the adoption of the U. S. P. method. How then could the defense, even if it were permissible as a matter of law, assay these tablets accurately except to experiment with some method or methods and then come into court and say that their method was accurate and the U. S. P.—official—method therefore inaccurate. The same view of the Court appears on pages 305 and 307 of the record and amounts simply to this: that if the defendants contended and showed by undisputed evidence as they did, that the U. S. P. method was inaccurate for the assay of these tablets, such evidence would have no probative value unless the defendants went further and assumed the burden of devising a method of assay which was accurate. Such a burden has never been and could not validly be imposed upon a defendant in a criminal case. The fact is that the U. S. P. method was the official and only method that was valid for determining the potency of these products whether they were shipped before or after the method became official and the only substantial evidence in the case on the subject showed conclusively that the labeled amount of estradiol was placed in the tablets and that the U. S. P. method was not determinative of the question presented.

VII.
CONCLUSION.

From the foregoing it follows that all of the substantial evidence is not consistent with guilt and is inconsistent with any reasonable hypothesis, but that of innocence. The misconceptions of the trial court mentioned led it to render the judgments and sentences, the one against Woodard Laboratories, Inc., being, according to our information the largest single sentence imposed against any single defendant in a food and drug case during the entire year of 1951. This extremely large fine of $2500.00 could only have resulted from the Court believing that the evidence of the Government showed the product to be below the labeled potency at the time of shipment. This evidence of the Government has been pointed out to create nothing more than a mere suspicion at the utmost. The misconception of the Court further led it to completely ignore the uncontradicted testimony which established as a fact that the products contained the labeled amount of estradiol, plus a 5% overage at the time of shipment and also led it to completely ignore, as inadmissible evidence, the experiments of Drs. Hoyt and Sobel which proved beyond question that under the U. S. P. method of assay *these products* containing no more than 22 mcgs. of estradiol in combination with 324,000 parts of excipients, could not be accurately assayed under the U. S. P. method for their estradiol content.

It therefore follows that by the record before this Court the judgments must be reversed.

Respectfully submitted,

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Attorney for Appellants.

APPENDIX.

STATEMENT OF FACTS.

(1) The Manufacture and Shipment of the Products Involved.

Woodard Laboratories ordered the estradiol used in the manufacture of the products involved either directly from International Hormones Company of Brooklyn, New York, or through its agent and broker, Silas & Company of Los Angeles. [R. 67.] The estradiol so ordered was not delivered to Woodard but shipped directly to Crest Laboratories of Burbank, California, who had been retained to manufacture the tablets into finished form. The manufacturing orders called for the manufacture of quantities of estradiol tablets each containing 22 mcgs. as well as a quantity of tablets each to contain 110 mcgs. [R. 68-71.] These tablets were manufactured by Crest Laboratories and delivered in bulk form to Woodard where they were packaged, labeled and shipped.

The estradiol furnished by International Hormones complied with the specifications called for by United States Pharmacopoeia, that is to say the pure estradiol had a melting range between 173 and 179 degrees and a specific or optical rotation between the range of 76 to 83 degrees. [R. 82.] (Vol. XIV, U. S. P., pp. 225 and 226.)

Joseph G. Galindo, Vice President and at the time of the manufacture of the products in question, production manager of Crest Laboratories, testified concerning the process and method of manufacture. Crest Laboratories is a private formula manufacturing company, that is to say they manufacture pharmaceutical products for other concerns such as Woodard Laboratories, to be marketed by the ordering concern under their own name and Crest

Laboratories does not sell or distribute any of the products they manufacture. [R. 98, 99.] The equipment used by Crest Laboratories is standard production equipment used in pharmaceutical manufacturing and they maintain as well an analytical library. [R. 99.] Mr. Galindo detailed his experience in pharmaceutical manufacturing and related subjects as follows: He attended the University of California at Los Angeles 1938-1940, majored in chemistry and attended a short course in chemical engineering at U. S. C. for six months in 1941. He became associated with Crest Laboratories in 1946 and has been with them ever since. [R. 100.] He belongs to the American Chemical Society, the American Pharmaceutical Association, the American Association for the Advancement of Science, the Medical Research Association of California, and the Institute of Food Technologists. One of his duties is the preparation of a publication known as "Crest Comments," the object of which is to disseminate some of the medical and pharmaceutical information appearing in the journals among the customers of Crest Laboratories, as well as anyone else interested and it is distributed to some of the largest manufacturers of pharmaceuticals in the world, *i. e.,* Squibb, Park Davis, Merck, etc. [R. 101.] The methods of manufacture employed by Crest Laboratories at the time the products in question were prepared were according to the accepted standards in the field. Mr. Galindo also makes trips East to consult with and study the methods employed by some of the largest pharmaceutical houses in order to keep abreast of new developments in the manufacturing field. [R. 102.]

Digressing for a moment and referring to the testimony of Mr. Sullivan, general manager of Woodard, it

is the uniform practice of pharmaceutical manufacturers and distributors to assign a "lot number" to all products which find their origin in a certain batch of material, for example, in connection with the products in question a certain batch or quantity will be manufactured and all tablets made from that batch or quantity will be assigned a certain lot number which will appear on the package in which the finished product is distributed. That was done in this case and Woodard assigned to the finished tablets received from Crest Laboratories manufactured from a particular batch their own lot number, for example, Woodard assigned Lot No. 497,567 to the products subject of Counts I, II, VII and VIII. [R. 67, 68.] They assigned Woodard Lot No. 897,618 to the products subject of Counts II and IV [R. 69] and Lot No. 107,694 to the products subject of Counts V, VI, IX and X. [R. 70.] With respect to Woodard Lot No. 497,567, Crest Laboratories assigned what is known as a "control number" to the batch from which those tablets were manufactured. They assigned control No. 2571 to the 22 mcg. tablets and control No. 2570 to the 110 mcg. tablets. (As heretofore stated at the time that Woodard ordered of Crest the manufacture of the 22 mcg. tablets to which Woodard assigned Lot No. 497,567, they also ordered the manufacture of a quantity of 110 mcg. tablets which, however, are not involved in this litigation.)

In connection with the products subject of Counts III and IV, bearing Woodard Lot No. 897,618, Woodard had ordered of Crest Laboratories the manufacture of a quantity of 22 mcg. tablets and a quantity of 110 mcg. tablets and Crest assigned to the manufacture of the 22 mcg. tablets control No. 2800 and control No. 2803 to the 110 mcg. tablets. [R. 104.]

In connection with the tablets bearing Woodard Lot No. 107,694 which are the subject of Counts V, VI, IX and X, Woodard had ordered the manufacture by Crest of a quantity of 22 mcg. tablets and Crest assigned its control number thereto of 3180. In connection therewith Woodard had also ordered the manufacture of a quantity of 110 mcg. tablets to which Crest also assigned control number 3181. None of the 110 mcg. products were charged to be below the labeled potency and are therefore not involved in the litigation. [R. 106.]

It should be borne in mind, however, that in connection with each order for 22 mcg. tablets Woodard also ordered the manufacture of 110 mcg. tablets which were manufactured in precisely the same way and with the same ingredients as were the 22mcg. tablets and the estradiol used was from the same bottle that contained the estradiol used in the manufacture of the 22 mcg. tablets. [R. 106, 107.]

Therefore comparing the lot number assigned by Woodard to the products involved in the respective counts and the corresponding control number given thereto by Crest Laboratories in the manufacturing process, we find the following:

Counts I, II, VII and VIII bore Woodard Lot No. 497,567 and Crest control No. 2571.

Counts III and IV bearing Woodard Lot No. 897,618 bore Crest control No. 2800.

Counts V, VI, IX and X bearing Woodard Lot No. 107,694 bore Crest control No. 3180.

In connection with the manufacturing process of each of the three batches involved in the counts as above referred to, Crest prepared what is known as work sheets. At the same time work sheets were prepared for the 110 mcgs. tablets. The preparation of such documents is standard pharmaceutical manufacturing procedure. [R. 107.]

The work sheet bearing Crest control No. 2571 which involved the corresponding Woodard control number 497,-567 (Counts I, II, VII and VIII) was introduced into evidence as Exhibit B. [R. 110.] Crest control No. 2570 was assigned the 110 mcg. worksheet. [Ex. E.]

The work sheet bearing Crest control No. 2800 which involved the corresponding Woodard Lot No. 897,618 and the products involved in Counts III and IV was introduced into evidence as Exhibit C. Crest control No. 2803 was assigned the 110 mcg. worksheet. [Ex. F; R. 110-111.]

The work sheet bearing Crest control No. 3180 which involved the corresponding Woodard Lot No. 107,694 and the products subject of Counts V, VI, IX and X was introduced into evidence as Exhibit D. [R. 111.] Crest control No. 3181 was assigned the 110 mcg. worksheet. [Ex. G.]

In connection with the work sheets for the manufacture of the products involved here and which constitute Exhibits B, C and D, an overage of estradiol

of 5% was used in each case, that is to say 5% more estradiol was used in the manufacture than called for to furnish a completed product with each tablet containing 22 mcg. of estradiol. [R. 112.] In the manufacture of each batch involved in the counts of the information, the steps employed were precisely the same, the ingredients the same and the quantities employed the same, the quantities, however, varying because more tablets were called for in some instances than in another. For example, Exhibit B shows the 45,285 tablets manufactured, whereas Exhibit C shows 100,000 manufactured. Consequently the proportionate amount of ingredients in the latter case would necessarily be correspondingly greater than in the manufacture of a lesser amount.

The steps used in the manufacturing process in each case were as follows: The individual materials called for by the work sheet were weighed separately by a weigh master and again checked individually to verify the exact weight. The materials were then turned over to the mixing department where they were again checked and then mixed in standard pharmaceutical mixing equipment. They were wet granulated. The estradiol was added and the wet mass extruded and fed on tracings to dry in a forced draft house and subsequently ground through a specified mesh and again mixed. [R. 113, 114.] It is a wet homogeneous mass. [R. 140.]

Lubricants are added and the mass is run through the tableting machine on rotary tableting presses. [R. 114.]

One of the reasons for providing for overages of materials in manufacturing is to compensate against loss of material in the manufacturing process that more or less naturally occurs. [R. 141.] A loss of some materials occurs principally by being blown off in the nature of dust. There is a loss in the punches or from the dies in the tableting machine and that is something that occurs always in the manufacturing process of such materials. [R. 150.] However, any quantity that is lost is a part of the homogeneous mass to which the estradiol has been added and mixed completely, and the solution wet throughout with that product so that if, for example, a certain amount is lost in the manufacturing process it is part of the homogeneous mass which cannot and does not affect the potency of the finished material or the quantity of any of its individual constituents. For example, if so much as one-half were lost the one-half remaining would still have in proportion the amounts of constituents called for by the work sheets but the end result would be that there would be only one-half of the amount of tablets than would have been the case if the other half of the homogeneous mass had not been lost. [R. 140.] The purpose of weighing the finished tablets after they have been tableted is not to determine the amount of the homogeneous mass that might have been lost but rather for the purpose of determining how many tablets have been manufactured. The tablets are not counted but are determined by weight after tableting, for the weight of one tablet is known. [R. 149.]

(2) Assays of Samples of the Products Are Made by the F. D. A. and the Results Thereof.

Samples of the products involved in Counts I and II (Woodard Lot No. 497,567, Crest control No. 2571) were obtained by an inspector of the Food and Drug Administration on September 2, 1949, and delivered to Jonas Carol for laboratory analysis and identified in part by the inspector by No. 29-794-K written thereon. [Ex. 1, pp. 1 and 2.]

Samples of the products involved in Counts III and IV (Woodard Lot No. 897,618, Crest control No. 2800) were obtained by an inspector of the Food and Drug Administration on February 9, 1950, and delivered to Mr. Carol for analysis. These samples were identified by the inspector by the number 49-677-K written thereon. [Ex. 1, p. 2.]

Samples of the products involved in Counts V and VI (Woodard Lot No. 107,694, Crest control No. 3180) were obtained by an inspector of the Food and Drug Administration on April 24, 1950, delivered to Mr. Carol for analysis and identified by the number 49-693-K written thereon. [Ex. 1, pp. 2 and 3.]

Samples of the products involved in Counts VII and VIII (Woodard Lot No. 497,567, Crest control No. 2571) were obtained by an inspector of the Food and Drug Administration on August 18, 1949, delivered to Mr. Carol for laboratory analysis and identified by the number 53-254-K written thereon. [Ex. 1, p. 3.]

Samples of the products involved in Counts IX and X (Woodward Lot No. 107,694, Crest control No. 3180) were obtained by an inspector of the Food and Drug Ad-

ministration on June 7, 1950, and delivered to Mr. Carol for laboratory analysis and identified by No. 88,164-K written thereon.

Jonas Carol, chemist for the United States Food and Drug Administration for 21 years and presently Chief of the Synthetic Branch of the Division of Pharmaceutical Chemistry was one of the two witnesses called by the Government to testify concerning the results of the assays of the samples in question. [R. 35, 36.]

Mr. Carol, as shown by the testimony, is a man of unquestioned experience who has written a number of papers in scientific journals on drug chemistry and chemistry of hormones and has done a great deal of work in the analysis of estrogenic hormones. He participates in the granting of doctors' degrees at Georgetown University on the subject of hormone chemistry or spectrophotometric analysis and consults with various chemists and commercial firms on the methods of analysis of hormones and he has analyzed or assayed drugs containing estradiol approximately 1,000 times. [R. 36-38.]

The United States Pharmacopoeia which publishes what is known as the U.S.P., meets periodically and has at all times various committees and groups devising standards for drugs, writing monographs describing drugs and tests that are to be made to establish their purity and composition and these tests are the regular tests for drugs if the test itself is to be found in U.S.P. An official U.S.P. method for the analysis of alpha estradiol tablets exists. He and his associates did experimental work and wrote the method of assay that appears under the heading "Alpha estradiol in Tablets" in U.S.P. U.S.P. XIV means the 14th revision of U.S.P. and that is the latest revision.

There are other ways of analyzing the quantity of estradiol in a tablet but each method would involve some way of extracting the estradiol from the tablet material or the excipients, and after extraction the quantity of estradiol extracted would be determined. [R. 39, 40.] The general process of extraction has been in use for at least 50 years and the earliest method by which the amount of estradiol extracted might be determined was first published in about 1933 or 1934. The U.S.P. XIV method is therefore an adaptation of methods that have been published; a refinement of them. This method is relatively simple compared to many hormone analysis. [R. 40, 41.]

With reference to the products subject of Counts I and II (Woodard Lot No. 497,567, Crest control No. 2571) he made an analysis of these tablets using an infra red procedure, which procedure is used after the extraction process has been completed, and he recovered 15 mcgs. of estradiol per average tablet as against the labeled potency of 22 mcgs. His recovery was 68% of the labeled potency and this analysis was made on or about January 20, 1950. He believes the infra red method is the most informative and definite available. [R. 42.] A portion of the same sample was reanalyzed on August 6, 1951, with the same result. The reason for the second analysis was to determine whether there had been any deterioration of the drug in the year and one-half that had elapsed from the first analysis and he found that it was unchanged. [R. 42, 43.]

With regard to the analysis conducted by him, in each instance there was involved an extraction procedure. In that process he used 6 portions of ether to extract the drug and then combined those six portions of ether, carried on

the analytical procedure to the end. After doing that on the same residue, he extracted six times more, combined these extractions, reanalyzed that portion and recovered no estradiol in the second combined extractions. [R. 44.] The witness then explained that in the extraction process the tablets, after being weighed, are powdered and an amount of the powder to contain the amount of active ingredient to be finally tested is weighed and suspended in water and placed in a separatory funnel. Then is added an emissible solvent which can be heavier or lighter than water. In his case he used ether, which is lighter. That is poured on top of the water in suspension of the tablet material and shaken. The active ingredient which is more soluble in ether than in water will pass into the ether. By use of a stop-cock at the bottom of the separatory funnel the water is drawn off and the alpha estradiol extracted remains in the ether. It is not expected that all of the estradiol will be extracted on the first extraction process, so the water is drawn off into a second separatory funnel. He would say that better than 90% would be extracted on the first extraction and on the second extraction; that is continued until no more water is left in the active ingredient.

He made a similar analysis of a sample of the product subject of Counts III and IV (Woodard Lot No. 897,618, Crest control No. 2800) and recovered 14 mcgs. of estradiol per tablet, or 63% of the labeled potency, which he reported on April 14, 1950.

He made a similar analysis of a sample of the product involved in Counts V and VI (Woodard Lot No. 107,694, Crest control No. 3180) and recovered 6 mcgs. of estradiol per average tablet, or 28% of the labeled potency, which he reported May 31, 1950. He reanalyzed that

sample on August 6, 1951, and recovered 5 mcgs. of estradiol per tablet, or 23% of the labeled potency.

He analyzed a sample of the product involved in Counts VII and VIII of the Information (Woodard Lot No. 497,567, Crest control No. 2571) and recovered 15 mcgs. of estradiol per average tablet, or 68% of the labeled potency which he reported January 20, 1950.

He analyzed a sample of the product involved in Counts IX and X (Woodard Lot No. 107,694, Crest control No. 3180) and recovered 6 mcgs. of estradiol per tablet, or 28% of the labeled potency, which he reported June 13, 1950. [R. 42-47.]

Analyses were also made by one of his associates, Dr. Edward Haenni, under his supervision. He gave Dr. Haenni three of the samples, which were samples of the products involved in Counts III and IV (Woodard Lot No. 897,618, Crest control No. 2800) and he analyzed those samples by the U.S.P. method and he recovered 14 mcgs. of estradiol per tablet, or 63% of the labeled potency on May 14, 1950. [R. 48.]

He also gave Dr. Haenni a sample of the product involved in Counts V and VI (Woodard Lot No. 107,694, Crest control No. 3180). He analyzed it by the U.S.P. method and recovered 7 mcgs. of estradiol per tablet, or 32% of the labeled potency which he reported May 31, 1950.

He also gave Dr. Haenni a sample of the product involved in Counts IX and X (Woodard Lot No. 107,694, Crest control No. 3180). He analyzed it by the U.S.P. method and recovered 7 mcgs. of estradiol per tablet, or 32% of the labeled potency which he reported June 13, 1950. Dr. Haenni followed the U.S.P. method exactly

and in addition on the initial extraction procedure, using chloroform as specified in U.S.P., he made four additional chloroform extractions, carried those through the U.S.P. procedure, and recovered no estradiol in them. [R. 48-50.]

Dr. Daniel Banes, a chemist with the Food and Drug Administration in Washington since 1939, and employed in the division headed by Mr. Carol, also testified. His chief work has been in research on the analysis of estrogenic hormone preparations since 1948 and he has specialized in drug analysis since 1940. [R. 51.] Dr. Banes obtained his Bachelor's degree in 1938, his Master's degree in 1940, and his Ph.D. at Georgetown University in 1950. His thesis in connection with the latter degree was on the natural estrogenic ketosteroids. He is a member of the Association of Official Agricultural Chemists, a member of Phi Beta Kappa, and an honorary society of Georgetown. He has written 12 papers dealing with the analysis of drugs, the last part of which have been concerned with estrogenic hormones. [R. 52.] He heard the testimony of Dr. Carol regarding the various methods of analysis, the period of time that the various methods have been in existence, etc., and his testimony he believes would be the same if the same questions were put to him as were put to Mr. Carol.

He received a sample of the product involved in Counts I and II (Woodard Lot No. 497,567, Crest control No. 2570) and analyzed it according to the U.S.P. XIV method. [R. 53.]

In developing the U.S.P. method his group tested a large number of samples containing various amounts of estradiol and convinced themselves that the number of extractions called for and the amounts used for analysis

would give a complete extraction of the estradiol and would permit an accurate assay for it. With regard to the use of chloroform in the extraction under the U.S.P. procedure, they were quite certain that with four extractions called for by that procedure it would extract all of the estradiol. [R. 54, 55.]

With regard to the samples of the product in question after all four of the extractions were made he reextracted the samples with four further portions of chloroform, evaporated the chloroform, went through the whole method prescribed by U.S.P., tested the second group of extractions and recovered a very negligible quantity of estradiol. [R. 55.]

He analyzed a sample of the product involved in Counts I and II (Woodard Lot No. 497,567, Crest control No. 2570) according to the U.S.P. method and recovered 16 mcgs. of estradiol or 73% of the labeled potency.

He similarly analyzed, according to the U.S.P. method, samples of the product involved in Counts III and IV (Woodard Lot No. 897,618, Crest control No. 2800) and recovered 16 mcgs. of estradiol, or 73% of the labeled potency. These analyses were reported by him April 6, 1951. [R. 57.]

He analyzed a sample of the product involved in Counts V and VI (Woodard Lot No. 107,694, Crest control No. 3180) and recovered approximately 7 mcgs. of estradiol, or 31% of the labeled potency. Since the recovery here was so much lower than the others, he crushed 30 tablets and put them in a thimble, a part of a Soxhlet extraction apparatus which will permit the continuous extraction of solid material. He described the process of this apparatus, and after 7 hours of extraction he tested the undissolved material for the presence of estradiol and recovered none.

He then took a portion of what was soluble in methyl alcohol, evaporated that and after evaporation went through the U.S.P. XIV method, and recovered about 7 mcgs. [R. 59, 60.]

He also conducted a test to determine whether any estradiol was destroyed in the heating process of the solvent and found that it was not.

He also analyzed a sample of the product the subject of Counts VII and VIII (Woodard Lot No. 497,567, Crest control No. 2571) by the U.S.P. method and recovered 16 mcgs. of estradiol per tablet, or 73% of the labeled potency.

With respect to a sample of the products involved in Counts IX and X (Woodard Lot No. 107,694, Crest control No. 3180), he recovered approximately 6½ mcgs., of 30% of the declared quantity and all those results were reported August 6, 1951.

With regard to the last analysis, after making the extractions called for by U.S.P. and the 4 additional extractions, he then added to the mixture of water and what was left of the tablets, 200 mcgs. of estradiol for the purpose of seeing whether it could be recovered quantitatively for following the U.S.P. procedure and he recovered 97% of the put-in quantity. [R. 61.]

In addition to these analyses they simulated tablets and analyzed these. [R. 62.] They weighed out sugar and added to that a small amount of magnesium stearate and mineral oil, those being the excipients commonly used in preparing tablets of this sort, and added a portion of this mixture which would correspond to an average weight tablet in the samples in question, added to those known amounts of estradiol and then analyzed the

mixture by the U.S.P. assay method. This material was not made up into tablet form. It remained powdered. The excipients used were corn starch, sugar, mineral oil and magnesium stearate. The mixture made up would be the equivalent of 10 tablets. [R. 63.] They used a mixture which would be the equivalent of 10 tablets because the quantity called for in the U.S.P. would be tablets each containing 200 mcgs. of estradiol. The tablets in question were labeled to contain 22 mcgs. of estradiol per tablet. In order to run the U.S.P. analysis, therefore, the equivalent of 9 or 10 of those tablets would be necessary in order to have the equivalent of a tablet containing 200 mcgs. of estradiol. [R. 65.] In connection with this simulation they were able to recover in all cases the amount of estradiol placed in the mixture.

On rebuttal Mr. Carol stated that the first time that an assay of estradiol in tablet form was prescribed in any official compendium was in the U.S.P. XIV, November, 1950, issue [R. 281], and he testified concerning extraction principles upon which the extraction procedure was based having been known for many years. [R. 281-283.] The U.S.P. method says nothing of the actual tablet strength to be analyzed. It merely provides that a weighed number of tablets containing a total of 200 mcgs. shall be used. [R. 283.]

In his work he has analyzed, according to U.S.P. procedure, other tablets containing less than 22 mcgs. per tablet of estradiol and found that they contain, as provided in U.S.P., 90 to 115% of the labeled amount. [R. 284.] He then discussed the various constituents found in the products in question and the effect of the extraction procedure upon them. [R. 284, 285.]

Mr. Carol stated that a competent chemist should be able to make the U.S.P. XIV assay method for alpha estradiol tablets and run an accurate assay in the manner prescribed in that volume. It would not be necessary for such a chemist to have had wide assay experience with such a product. [R. 292.] He does not mean that the U.S.P. method could not be improved upon as he has never seen any method that could not be improved. He only says that the U.S.P. method is the best method possible that he knows of to use for the assay of estradiol. In his analysis he did not precisely follow the U.S.P. method. [R. 293.] He used the infrared procedure which would be at the end of the final reading or estimation. So far as Dr. Banes was concerned, he followed the U.S.P. procedure but deviated from it with regard to some samples. Others he made no deviation in extraction or otherwise. [R. 294.]

Dr. Banes and Mr. Carol's assays differed in the final result to the extent of 1 mcg. each. [R. 295.] If an assay is run several times by competent, qualified chemists and duplication of results are not obtained, and they are learned in the field of analytical chemistry and make no mistakes in any manipulation, and cannot get duplication of results, then it means that either the method of assay is faulty or that the samples with which they start do not have the same composition. The U.S.P. method provides for the spectrophotometer method at the end of the assay for the purpose of reading or determining the amount of estradiol present. [R. 296.] It makes no reference to the use of an infrared method. [R. 297.] He did not analyze any of the 110 mcg. products which were manufactured at the same time that the products in question were manufactured. No samples of the 110

mcg. products were obtained, otherwise they would have gone to him for analysis. [R. 298.] He used the infrared method because it showed the exact amount of estradiol or whatever material is present. [R. 299.] With regard to his testimony that he had conducted some experiments to determine his ability to extract estradiol from excipients into which they had been absorbed, in his experiments they added estradiol to the mixture and then reextracted and obtained 97 or 98% of the amount put in. *The amount of estradiol put in was not 22 mcgs. but was 10 times that or 220 mcgs.* [R. 330, 301.]

(3) An Official Assay Method Is Adopted After the Manufacture and Shipment of the Products in Question.

Volume XIV U.S.P., or the 14th revision, became official November 1, 1950. There appeared in that work for the first time on page 227 the recognition or listing of alpha estradiol tablets and a method for assay for those tablets.

The products involved in Counts I and II were shipped August 22, 1949. Those in Counts III and IV, January 24, 1950. Those in Counts V and VI, April 13, 1950. Those in Counts VII and VIII, July 12, 1949, and those in Counts IX and X May 25, 1950. [See Ex. 1.]

As heretofore mentioned, not only were the shipments involved, and necessarily the manufacture of the products in question prior to and in many cases long prior to the time that an assay method for estradiol tablets became officially recognized, but as well all of the assays of the samples of the products in question, were conducted by the Government witnesses prior to the time that there existed any official method for the assay of estradiol tablets.

(4) The Notice of Alleged Violations to Defendants.

In 1950 a Notice of Hearing was received by Woodard from the Food and Drug Administration in Los Angeles alleging that certain products had been picked up bearing Lot Nos. 497,567 and 897,618 and that upon analysis these products were shown to be below the labeled potency of 22 mcgs. of estradiol per tablet. A hearing before the Food and Drug Administration was had and a couple of months later another Notice of Hearing, followed by a hearing, was had concerning samples of certain products being Lot No. 107,694 being below potency. Following these hearings Woodard contacted a number of laboratories to have samples of the lot numbers involved assayed for the purpose of determining the amount of estradiol present in the tablets. One of these was Adam Laboratories of New York. Others were Bio-Science Laboratories of Los Angeles, Shankman Laboratories of Los Angeles and Truesdail Laboratories of Los Angeles. Samples of tablets involved in the 3 lot numbers were sent to them for assay. [R. 72, 73.] Correspondence passed between the Food and Drug Administration and Woodard as reflected by Exhibit 2 and in a letter dated July 17, 1950, Woodard addressed a letter to that Administration advising them that the variations in the results of the assays conducted by these laboratories had been so great that the assays were meaningless, that the raw material used in the making of these tablets was tested and found up to the necessary potency. The materials and controls used in the manufacturing process were checked and

found to be satisfactory, all of which indicated that the required amount of estradiol, the amount declared on the label to be present in the tablets, were placed in the tablets and the question was raised whether it was possible for the tablets in question to be assayed by any known method and accurate results obtained. Following that letter another letter was addressed to the Food and Drug Administration by Woodard on December 5, 1950 advising of the assays made and the results of these assays received from the several laboratories that had been called upon to conduct them. This information was submitted for the purpose of letting the Food and Drug Administration know the efforts that Woodard had made to find out where the trouble lay. One of these laboratories was Adam Laboratory in New York, and there is included in Exhibit 2 correspondence passing between that laboratory and Woodard. That laboratory was the only one that had found on assay that the samples of the product involved had been equal to or above the declared potency. As a matter of fact, by reason of the results reached counsel for defendants made a trip to New York and took the deposition of Elizabeth Adam Weiss. However, counsel for the defendants stated that he was not going to offer the testimony of Miss Adam concerning the assays conducted by her for the reason that as a result of subsequent examination and investigations in Los Angeles he was satisfied that her conclusions were incorrect. [R. 97.]

(5) Assays of Samples of the Products Are Obtained by Defendant and the Results Thereof.

All of the laboratories retained by Woodard to conduct assays of samples of the products in question, together with the results obtained, are set forth in a letter of December 5, 1950, part of Exhibit 1, to the Food and Drug Administration. It will there be seen that these assay results varied from 2 mcgs. per tablet to 14½ mcgs. per tablet, eliminating, however, the findings of Adam Laboratories.

Dr. C. E. P. Jeffreys, a consulting chemist and holding a Ph.D. degree in chemistry and Technical Director of Truesdail Laboratories, Inc., received his bachelor and master degrees from the University of Texas, and his Ph.D. degree from the California Institute of Technology. He taught at both of those institutions during his graduate study days and has done post-doctorate research at Cal Tech for two years in biological chemistry. [R. 203.] Truesdail Laboratories is a general consulting laboratory employing the analysis of materials. He has been connected with that laboratory for about 15 years and in connection with his work conducts the assay of materials. On July 27, 1950 he received a sample of the product in question from Woodard bearing Lot No. 004,769. The correct Woodard Lot No. of this sample was 107,694, a sample of the products involved in Counts V, VI, IX and X, but Woodard assigned a fictitious lot number (No. 004,769) to that sample sent to Dr. Jeffreys because they had sent out so many other samples of that

lot number for analysis that they decided in order to avoid confusion to give it a fictitious lot number and let the assays start from there. [R. 228.] He was requested to conduct an assay of those tablets for the purpose of determining the amount of estradiol in the tablets. Prior to that time he had been requested by Crest Laboratories to run an assay of similar tablets for estradiol content but did not because he did not feel at that time that there was an acceptable method available for commercial assay of such a tablet. That was prior to the adoption of the U.S.P. method. On or about July 27, 1950 Dr. Jeffreys had received a copy of the U.S.P. XIV which was to become official November 1, 1950 and after having obtained that volume he ran an assay according to the method prescribed in it for estradiol tablets. He took a sufficient number of the tablets to equal 200 mcgs. of estradiol in the test sample, as the U.S.P. method calls for tablets containing 200 mcg. rather than 22 mcg. Due to the low potency of the tablets the amount of excipients made a very bulky mass and he had to increase the relative amount of solvent in order to handle it. The assay results were variable and low. He felt that the difficulty was in the lack of complete extraction of such a small amount of estradiol from the large amount of excipients. Therefore in attempting to improve the efficiency of extraction, instead of grinding the tablets into powder and then wetting them with water, alcohol and acid, the tablets were placed in a Waring blender or mixer and mixed in order to obtain a more intimate mixture of the insoluble material with the solvent, hoping thereby to extract a larger proportion of the estradiol. Even by that procedure low results were obtained, namely 9.5 and 9.1 mcg. per tablet. Mixing by the Waring

blender is not specifically prescribed in U.S.P. procedure but it is a means of getting more intimate contact between the material or excipients which is in large part insolvent and a liquid solvent, in order to more efficiently be able to extract the soluble material—estradiol —from the mixture.

In any assay procedure the first thing necessary is to extract the material that is to be assayed, such as estradiol here, from the other material or the excipients with which it is in combination. The essential thing in any analysis is this separation in such form that it can be measured, separated from all other materials. [R. 205, 206.]

In the science of analytical chemistry such an extraction process is very often a major problem. For instance, as applied to this case where there exists a mixture of soluble and insoluble materials, such as the estradiol which is soluble and the excipients which are not, there is often an adsorption of the soluble material on the surfaces of the insoluble material, holding of the material to be assayed which would ordinarily be soluble in the solvent. In other words, it sticks to the insoluble surfaces. It is essentially an interaction between surfaces, surface versus surface, which is interaction between the molecule that is adsorbed to the solid surface and in some cases it is quite difficult to remove this adsorbed layer by a solvent which would easily dissolve the estradiol, for example, if it were not in combination with these exhibits.

In connection with the product in question labeled to contain 22 mg. of estradiol, if the proportion of estradiol to the excipients present in the tablet was 22 es-

tradiol to 324,000 parts of excipient (which was the ratio of the tablets in question), that ratio would of course have a bearing on the success of the extraction of the estradiol, for the more excipients the more free surface of insoluble material and consequently the more adsorption there would be thereon of estradiol and the amount of estradiol that could be extracted would decrease with the increase of the solid surfaces of excipients which could hold it back. [R. 207.]

In an assay procedure of tablets such as these, he would not be able to know that all of the estradiol had been extracted unless he knew the amount that was put in, and obtained an indication of having gotten the total amount out by the analysis. By following the U.S.P. method in assaying a tablet such as this containing only 22 mcg. per tablet—a microgram being one millionth of a gram—he would not be able to say that all of the estradiol had been extracted. [R. 208.]

It is not possible for a chemist to make a determinative assay of a tablet such as this without having a blank tablet, that is, one containing all of the excipients contained in the tablet subject to question, but with no estradiol in it or with prior knowledge of the excipients in the tablet in question and the quantities. The reason for this is that the object of the assay procedure is to interpret the amount of estradiol at the end of the procedure simply on the basis of how much light the solution being investigated happens to absorb. In such a procedure one is depending upon the success of the prior operations to have removed everything except the estradiol from the excipients and have it in the final solution. [R. 211.] With a blank tablet it would be possible to know

by the assay method the interferences of the excipients and in the assay of the tablet itself with the estradiol in it corrections could be made for those interferences.

The U.S.P. method is a very sensitive method but it is cumbersome and depending upon the amount of the excipients in the tablet it may not be efficient, and the greater the disproportion between the active material—estradiol—and the excipients, the less efficient the method is likely to be. [R. 212.] In using the U.S.P. method it is possible for material to be extracted along with the estradiol and on the final reading of course the result would not be accurate and even with a high result as might be expected under those circumstances, it would not be indicative of any significance and even with such a result it would not be possible to know that some of the estradiol had not remained with or been adsorbed by or on the excipients.

The Kober method of assay does not contemplate or provide for the assay of estradiol tablets as distinguished from estradiol alone. It is simply an assay method for pure estradiol and does not provide for the extraction of estradiol from any excipients. [R. 213.] If one were to use that method they would have to use some procedure for extracting the estradiol first and it applies only to the final reading and measurement of the material. The most difficult job in any analytical chemist's experience is the separation of the ingredient to be measured into a measurable form. The actual measuring is usually quite simple. [R. 214.]

In the assay conducted by him of the tablets in question in his opinion he did not extract all of the estradiol present and this because of the large disproportion be-

tween the estradiol and the excipients. In his opinion the enormous amount of excipients, partly soluble and partly insoluble, that a complex organic compound with active bond such as estradiol has, in all probability adsorbed on portions of the excipients or was left behind and was not gotten out for the final measurement process. He said this for the reason that from general experience with the difficulties of extraction of materials even the simple extraction of inorganic materials it is a difficulty always present. Extraction procedures are the last resort of American chemists and they are avoided whenever possible. They are realized to be relatively inefficient. The phenomenon of adsorption is always a difficult thing to handle. For example, assume that estradiol is mixed with talc. No matter how many times it may be washed with something that would dissolve estradiol, there may still be estradiol on the talc and there is an equilibrium each time you wash it between what is on the surface and what is taken off. After taking off a certain proportion relative to the amount of effective adsorbing surface, the amount that can be taken off by subsequent extractions becomes smaller. [R. 215.]

In his opinion the U.S.P. method for the assay of an estradiol tablet is not applicable or suitable to or accurate for the assay of the tablets involved in this case because the potency, the amount of estradiol relative to the amount of excipients is too disproportionate for the method to be effective. [R. 215.] The conduct of an assay is the employment of analytical chemistry which teaches to effect the separation of constituents of mixtures and enables one to estimate quantities by some means after the unknown materials have been separated into pure components in a case like this. A competent

chemist should be able to take an assay procedure as set forth in U.S.P., use it for the first time and do it accurately if the method is any good. [R. 216.]

U.S.P. is an official compendium or standard of so-called official drugs and assay procedures are given to enable chemists and pharmacists to determine whether any batch of drug material meets the specifications of U.S.P. A competent, qualified chemist should have no trouble in pursuing this method. [R. 216.]

The Truesdail Laboratories is frequently called upon to conduct U.S.P. assays of products which they had not assayed before. This happens very frequently and is not at all uncommon. [R. 217.]

If some of the excipients have been extracted along with the estradiol not necessarily a higher reading on the final estimation will result. If the chemical material or excipient extracted with the estradiol at the time of reading absorbs light, it will give a higher reading but not otherwise and in some cases interfering materials will prevent the proper color development on the final estimation. [R. 220.]

At no time did he know what the excipients in the tablets were. He was furnished with no blank material. [R. 221.] His conclusion that the low result obtained by his assay was due to inapplicability of the U.S.P procedure to this tablet, was based upon his experience with such method of extraction procedures and he was not retained to test the efficiency of the U.S.P. method but instead to assay the product according to that method. [R. 223.] In any assay procedures run by him the tests are run in duplicate and in this connection the duplicate results did not agree at all. This was when they ran

the assay strictly according to the U.S.P. method and any method of assay is not an accurate one if duplication of results cannot be obtained. Explaining this he stated that in any assay, particularly in organic analysis, there is going to be certain variability of results—just unavoidable variability. Even the U.S.P. method allows a variation from 90 to 115% in the assay of estradiol tablets. The difficulty with organic materials is that the allowable limits of error are somewhat looser than for instance in analyzing a piece of steel for its constituents, but when assaying a material of the kind in question and one of the assays shows 20% as against 80% for the other, or something like that, then definitely something is wrong and the results are no good and that was comparable with the results obtained at the first when the U.S.P. method was run exactly as it is set forth. [R. 224, 225.]

In answer to some questions by the Court, Dr. Jeffreys stated that with reference to the test conducted by him wherein the Waring blender was used and he recovered for final estimation 9:5 mcg. of estradiol, that 12½ mcg. remained in the residue and couldn't be extracted and the 12½ mcg. is an extremely minute amount. If the tablet in question had been a U.S.P. tablet containing 200 mcg. of estradiol and 12½ mcgs. remained with the excipient, the percentage of loss would be quite small, but when tablets containing 22 mcg. such as these in question are assayed and 12½ mcg. remained unextracted, the percentage is very high. He knows of no method that he would want to depend upon as an accurate assay for determining the amount of estradiol present in the tablet when the amount alleged to be present was only 22 mcg. [R. 226, 227.]

Don Carlos Atkins, employed by Crest Laboratories as Director of Laboratories since July, 1950, received his Bachelor and Master's degrees in chemistry at U.C.L.A and has been working on his Ph.D. at U.S.C. He is a member of the American Chemical Society, the Sigma Phi and Phi Lambda Epsilon Societies and the Academy for the Advancement of Sciences. He received the Morrison all-Navy scholarship for his undergraduate work at U.C.L.A. [R. 157.]

Immediately prior to coming with Crest Laboratories he was at the University of Southern California working on his Doctor's degree.

He examined the work sheet, Exhibit B, which was the work sheet used in the manufacture of the products involved in Counts I, II, VII and VIII, being Woodard Lot No. 497,567, and Crest control No. 2571, and he stated that the ratio of the amount of estradiol present in a tablet to the amount of excipients in the same tablet called for by that work sheet was approximately 22 parts of estradiol to 324,000 parts of excipients. [R. 158.] In the assay of estradiol at Crest Laboratories they had run a number of tests using various published methods for assay of that product. They have examined those procedures and evaluated them according to their own opinion, including the U.S.P. XIV method. He has conducted approximately 100 assays of estradiol tablets. He was then asked, with reference to the U.S.P. method, and keeping in mind the excipients present in these tablets, which of those excipients in his opinion could interfere with the readings or final estimation of the amount of estradiol in the tablets at the end of the procedure. This question was subject to objection

on the grounds that merely conducting 100 assays did not qualify the witness to answer the question. The Court overruled the objection, stating that the objection went to the weight of the testimony rather than to admissibility. [R. 159, 160.] He had used a colorimeter for the purpose of finally estimating the quantity of material at the end of an assay over 1,000 times. One of the constituents that would interfere with the final readings would be mineral oil and others would be starch, sterotex and possibly sugar, and those excipients were present in the tablets here. They could interfere in several ways which he mentioned. [R. 160.] He heard the testimony of the simulated product made up for experimental purposes by the Government witnesses. The Government used magnesium stearate in its simulated product and that is not involved in the present tablet. It would probably be used as a substitute for sterotex and in his opinion it would be soluble to a greater extent than would the sterotex and thus tend to interfere with the proper conduct of the assay. [R. 161.]

The degree of solubility would affect the instrumental reading at the end of the assay.

There are 2 steps in the U.S.P. XIV procedure, One is to extract the estradiol from the excipients and the other is to determine the amount of estradiol extracted by the use of a colorimeter or some other machine. The U.S.P. method is a long method—long in the number of steps to be taken before one can make any attempt to determine the amount of estradiol extracted. [R. 162.] Magnesium stearate being more soluble in chloroform, the extracting material would tend to remain with the residue that was supposed to contain nothing but es-

tradiol and would thus interfere with the final readings. [R. 163.] It might give a higher reading depending upon the adsorption of light by magnesium stearate but even if a higher reading were obtained it would not necessarily mean that all of the estradiol had been extracted. He has examined the Kober method of assay and that method does not give the information necessary to conduct an assay of a tablet such as this because it provides for the analysis of pure estradiol alone and not in combination with anything else. [R. 164.] That method is useful where one has a liquid material that purports to be estradiol but it is desired to run an assay to be sure whether it is and, if so, how much but it provides no method for extraction of estradiol in combination with solid excipients such as were present here.

The extraction procedure is one of the principal steps in the assay of estradiol because if all of it is not extracted then obviously the amount of estradiol in the tablet itself cannot properly be measured at the end of the assay. [R. 165.]

The purpose of the excipients is to give a tablet the desired weight, shape and form and to enable a person to consume the finished product, as it would be very difficult to take estradiol in its pure form.

He was aware of no method appearing in the scientific literature prior to the time that the U.S.P. method became official, November 1, 1950, designed for the assay of tablets containing estradiol in combination with other excipients. [R. 166.] In any analysis in which there are other ingredients than the one to be measured, those other ingredients may affect the analysis and therefore any complete assay must take into account the excipients

present. If each one is not taken into account in the assay procedure, the analyst is not absolutely certain whether all of the estradiol has been extracted or whether something has been extracted along with the estradiol which interferes one way or another in the final estimation. [R. 167.] In connection with the tablets in question, it was his opinion that there were excipients present which tended to interfere with the assay. In his opinion the principal one was mineral oil. Explaining this he stated that in the assay it is necessary to determine the amount of estradiol at the end of the assay by measuring the absorption of light which is passed through a solution containing the estradiol and this absorption is proportional to the amount of estradiol present. If, however, there is some other material in this solution that is being estimated which also absorbs light, it will interfere with the true reading of the amount of estradiol present and in his opinion that happens in the analysis of these tablets.

He had conducted experiments for the purpose of determining whether there were excipients that interefered with the assay. In connection with that experiment he made up some tablets identical in every respect with the ones in question, with the mineral oil and sterotex left out. In such cases the tablet assayed up to the claimed potency. He felt that the U.S.P. procedure was not satisfactory for the assay of these tablets because every time he ran the U.S.P. procedure he found an interference which indicated a higher quantity of estradiol in the tablet than he knew to be present. [R. 169.] In this connection he made up a batch of tablets containing all of the excipients and in the same amounts as those involved here. They were assayed according to the U.S.P.

procedure and he found in the final estimation 97 mcg. of estradiol, whereas he had only put in 23. Continuing, then, he made a modified procedure by which the estradiol is extracted by a continuous extraction device—the Soxhlet device—mentioned previously and the extraction fluid used was ether. This ether extraction of estradiol was evaporated down to dryness in a steam bed under nitrogen atmosphere and the residue taken off immediately in ethanol. To this was added sulphuric acid which develops the color. From the density of this color, which is developed because of the addition of the acid, and subsequent treatment of the solution, one can determine the amount of estradiol present. This is an improvement over the U.S.P. method because the multitude of extractions with the great deal of handling involved in the U.S.P. procedure is eliminated but even with that modified procedure there was still interference if mineral oil was present in the mixture.

He then conducted an experiment using the same excipients in the same amount as those present here but with the mineral oil alone omitted. In this he followed his modified procedure and obtained very good results, that is to say he put in 73 mcg. of estradiol and recovered on the final estimation 68.5. As a result of those experiments and his work it is his opinion that the presence of excipients makes it necessary that an analysis of estradiol be made with full knowledge of the exact excipients in the tablet as well as their amounts and if that is not done a correct assay cannot be obtained. [R. 172.]

In any assay procedure the margin of error increases as the potency of a product decreases. For example, if one added 100 mgs. of a certain material and there was

left in the assay procedure 1 mg., the error would be about 1% but on the other hand if one were analyzing a product containing 2 mgs. and 1 mg. were lost, the loss would be 50%.

Considering the ratio of estradiol in the tablet to be 22 of estradiol to 324,000 of excipients, that ratio would definitely affect an assay result, for one is analyzing to determine the presence of a very small amount of material in a large amount of excipients, which means that the assay procedure must be such as to pick out that particular material that is being assayed and must state quantitively how much of it is present and the probability of extracting it all is not as great as it would be if there were more estradiol present or the ratio between the amount of estradiol and the excipients less. In other words, in this procedure with these tablets what is attempted is to pick out 22 parts from a mass of 324,000. [R. 174, 175.]

It is his opinion, therefore, that the U.S.P. XIV assay procedure is not suitable or accurate for the assay of a tablet such as this containing but 22 mcg. of estradiol in combination with a great mass of excipients. [R. 179.]

He had made no assay of the tablets involved in the counts subject of the Information. [R. 180.]

Anything that is soluble in the chloroform, which the U.S.P. method calls for, would stay with the estradiol and be measured in the final estimation. [R. 183.] If the excipients are not completely removed in the extraction procedure they will interfere with the final read-

ings and it is his opinion that they are not removed completely in the U.S.P. procedure. He would not be prepared to say whether the reading would be higher or lower if the sterotex and mineral oil remained in the solution with the estradiol. It is his opinion that the U.S.P. procedure in itself does not permit one to make a conclusion because sometimes a higher result is obtained and sometimes a low result is obtained in the U.S.P. procedure, depending upon the amount of excipients. [R. 185.]

In his opinion if these excipients remained in the solution with the estradiol they would give a higher reading and not a lower reading. [R. 186, 187.]

He was then questioned extensively on cross-examination concerning the number of steps and what was done in the U.S.P. procedure [R. 187-190] and then the Court said,

> "Of course, gentlemen, if you are going to come out with 10 or 12 (steps) I can't see the materiality. I frankly can't see the materiality of this questioning." [R. 190.]

Counsel then stated,

> "The whole purport of the questioning was to show simply that while it is contended on the one hand that the manufacturing process cannot possibly result in any loss and does not, yet because there are 12 steps in the analysis, in that analysis you get all sorts of possibility of error in loss. It was simply that point I was trying to develop."

To which the Court replied,

> "Well, counsel, if as you think on these steps in the manufacture the responsibility still rests with the manufacturer * * * at the end of which are 5 or 10 steps when he gets through to have the required amount of estradiol in it, what difference does it make whether it takes 1,000 steps or 5 steps." [R. 191.]

Sterotex is more soluble in chloroform than magnesium stearate and would tend to interfere with the reading. He has not measured the interference of sterotex itself but in his opinion the interference of all excipients would tend to give higher readings and being more soluble would likely be found in the final result, more so than magnesium stearate. [R. 192.]

The mineral oil definitely interfered with the assay and gave a cloudy solution in the end. There should be no more than three things in the product which would give a cloudy mixture if the separation of the solutions had been complete and those would be mineral oil, sterotex and estradiol. [R. 193.] They shook the mixture four times and still got the same cloudy result and the cloudy mixture gave a high reading. In analytical chemistry the chemist learns a variety of extraction procedures which can be adapted to a particular product subject of analysis, provided the extraction procedure is applicable to that type of product and if he is to get a definitive answer and there is a possibility of interfering materials, he must know what extraction procedure should be used. [R. 195.]

Answering questions of the Court Mr. Atkins stated that in his experiment he used 23 mcgs. of estradiol and on the final reading it showed 96, which he attributes to the interference of the other excipients in the tablet, principally mineral oil and sterotex. If a person put in 23 mcgs. and obtained a final reading of 15, it would appear that he had successfully avoided interference with the reading but it would not mean that the interference in the sense of incomplete extraction of the estradiol from the excipients had been avoided. Even though a value of 96 mcgs. were obtained on the final reading, it would not mean that all of the estradiol was extracted. He did not know and it would be impossible to know whether the 96 mcgs. of apparent estradiol was 90% estradiol and 10% interfering material, or the other way around. [R. 197.]

With the mineral oil and sterotex in the product they dissolve with the estradiol and are confused with the final reading but he is not able to say whether or not, along with the mineral oil and sterotex all of the estradiol was extracted. [R. 199.]

If some other chemist conducted an experiment and came out with less estradiol than Atkins did, that is with tablets containing sterotex and mineral oil, he did something different than provided for in the U.S.P. procedure, which was the one that Atkins followed and in thus avoiding the interference encountered by Mr. Atkins he did something different than that prescribed in the U.S.P. procedure. If he followed it and came out with less he was apparently able to avoid the interference. [R. 202.]

(6) Experimental Assays Are Caused to Be Made by Defendants and the Results.

Mr. Galindo, Vice President and Production Manager of Crest Laboratories, stated that at the request of counsel for the defendants on June 27, 1951, he had prepared a work sheet for the manufacture of about 7,000 tablets each containing 22 mcgs. of estradiol. The work sheet was prepared identically with the work sheets pertaining to the products in question, Exhibits B, C and D, and that work sheet was offered into evidence as Exhibit H. At this time an objection was raised to the introduction of Exhibit H on the grounds that the proof sought to be made was some time after the manufacture of the tablets in question and that Exhibit H did not involve any of the shipments involved in the case and it therefore had no probative value. This objection was argued extensively and counsel for the defendants stated that after returning from New York and the taking of the depositions in that city, in order to test or determine whether 22 mcgs. of estradiol could be extracted by the U.S.P. method from tablets composed such as these, he arranged for an experiment to be made wherein blank tablets composed exactly as those in question would be prepared identically with those in question and then the amount of estradiol in question, or the equivalent, would be put into the tablet and this assay run. This objection was sustained, the Court stating that even so such testimony would not be admissible. This matter was argued at considerable length, the court stating that he was not interested in any test made at a later time and of some experimental tablet even though composed in the same way as these and counsel for defendants then found it necessary to make an offer of proof, which he did. An

objection was made to the offer of proof and the objection sustained. Counsel for the Government however withdrew his objection and the testimony continued. [R. 115-126.]

The work sheet of these test tablets was made up identically with those involved in this action, the same amount of estradiol, the same amount of excipients, and so on. [R. 127.]

In the manufacture of this batch of tablets, Mr. Galindo, Mr. Atkins and the pharmacist at Crest Laboratories personally followed each step throughout the course of the entire manufacture until the finished product was obtained.

On the same day, using the same work sheet, they made up another batch of tablets with the same ingredients in the same amount but with the estradiol omitted, and this batch was manufactured in precisely the same way, with the same men personally supervising each step in the manufacture.

Both batches were completed June 27, 1951 and samples of both sent to Dr. Robert E. Hoyt at the Cedars of Lebanon Hospital in Los Angeles. [R. 128, 129.]

The experiment which follows was conducted by Dr. Robert E. Hoyt in conjunction with Dr. Harry Sobel, both of the Cedars of Lebanon Hospital, and their experiment involved the use of samples of the experimental batch testified to by Mr. Galindo, prepared from the work sheet, Exhibit H, and manufactured with the same ingredients in the same proportions and with the same amount of estradiol as concerned the manufacture of the products in question. Their experiment also involved the

use of the placebo or blank tablets testified to by Mr. Galindo, manufactured in precisely the same way but with the estradiol omitted.

Dr. Robert E. Hoyt is employed in the Division of Laboratories, Cedars of Lebanon Hospital. [R. 229.] He obtained his B. S. degree at the University of Washington in 1933; M. S. degree, University of Minnesota, 1934; Ph. D. degree, same university, 1939. His major was bacteriology, urinology and pathology. His academic positions were as follows: Teaching fellow and subsequently instructor University of Minnesota Medical School [R. 230], Instructor School of Medicine University of Utah, Department of Bacteriology and Pathology about 1942; then co-director Institute of Experimental Medicine, College of Medical Evangelists, Los Angeles. The principal function of the Institute was to carry out experimental studies in medicine and related fields and to perform or supervise performance of various laboratory procedures considered too delicate or difficult for the average laboratory personnel to carry out properly. [R. 231, 232.]

An important part of their procedure was the conducting of assays of materials from time to time. These included assays for various steroid hormones of the sex hormone and adrenal cortex type excreted in different proportions and under different conditions, with various dose proportions. They carried out determinations of such particular substances in various body fluids and tissues of patients, including estrogenic and urinogenic hormones and adrenal cortex hormones of that sort. [R. 232.] He was associate professor, Department of Bacteriology at the College of Medical Evangelists. After leaving there he spent a year in Salt Lake City where he was bio-chem-

ist with the Veterans Administration and Assistant Clinical Professor, Department of Pathology. In addition to his present position at Cedars of Lebanon, he is assistant clinical Professor, Department of Infectious Diseases, U. C. L. A. During the war he lectured at the U. S. C. Medical School in the Department of Bacteriology. [R. 233.] He has written and published about 35 papers dealing with scientific subjects. One of these had to do with the development and evaluation of an assay procedure for pregnandiol appearing in the urine of pregnant women, which is a field related to the subject of estradiol, since the drugs are structurally related, behave similarly, and the problems of extraction and evaluation are roughly the same. This paper was prepared in conjunction with Dr. Raymond Mitchell [R. 233, 234] and it appeared in the Journal of Clinical Endocrinology in February, 1950. [R. 234.]

In the middle part of 1951 he received some tablets from Crest Laboratories. They were two large bottles containing tablets, one labeled "placebo tablets" and the other gave a serial number and stated that the tablets contained 23.3 mcgs. of estradiol per tablet. A placebo tablet is one which does not contain the item which is subject of investigation—a blank tablet. [R. 235.] Their problem was to determine whether there might be some difficulty involved in the extraction of estradiol from the tablets which would cause the final result to be erroneous. Dr. Hoyt had made up a chart showing the results of the assay procedures conducted by him which was introduced

into evidence for illustrative purposes as Defendant's Exhibit I. [R. 248.]

Referring now to Exhibit I, with respect to the first horizontal column "Standard 200 mcg.," the figures in that column mean this: They took a sample of pure estradiol without any excipients in the amount of 20 mcgs. and made readings of this pure material on the colorimeter with the results indicated in that column. The reason for so testing the pure material was that if the liquid amounting to 20 mcgs. of estradiol was placed in the top of a separatory funnel and drawn out, 20 mcgs. would not be extracted from the bottom because some is going to cling to the walls of the vessel and though it be rinsed and washed one cannot be perfectly certain that it will all be gotten out as there is inevitably a loss when a fluid is transferred from one funnel to another. The U.S.P. method provides for a correction for a presumed loss, that is, a standard solution containing a small amount of pure estradiol is processed by going through all of the steps identical with the sample to be tested and this standard is considered to compensate for handling losses and for solubility losses which will occur as it is placed from one solvent to another.

So the second horizontal column describes the results obtained when the pure estradiol was processed throughout the U.S.P. method. [R. 238, 239.] It was their first problem to discover how much of the pure estradiol could be extracted without the presence of the excipients in following the U.S.P. procedure. Therefore, following

the second horizontal column over to the 4th vertical column, they found that instead of 20 mcgs. of estradiol recovered there was 14.5 mcgs. recovered, or a recovery of 72.5% and that was then used as the basis for a correction factor in testing the tablets themselves. It is an amount of loss to be anticipated to occur in the method itself. [R. 240, 241.] (The first horizontal column represents the color standard and shows what color will be developed by 20 mcgs. of pure estradiol. [R. 242.]) 72.5% of the total amount put in being recovered, meant a loss of 27½% of the pure estradiol when assayed without anything else according to the U.S.P. procedure. [R. 242, 243.]

The third horizontal column represents a test as follows: With the tablets containing serial No. 2571-B and labeled to contain 23 mcgs. when run through the U.S.P. test it was found, as shown by the 4th vertical column, that 10.1 mcgs. of the 23 were recovered or, as shown by the 5th vertical column, 44% of the labeled potency was recovered. After making the correction for the known loss of 27½%, this represented a recovery of 13.8 mcgs. instead of 23, or 60% of the total labeled potency. In other words, 40% of the labeled amount was lost somewhere in the assay procedure after making correction for the amount that it was known would be lost. [R. 243, 245.]

Then coming to the fourth horizontal column the figures there represented a test conducted as follows: Dr. Hoyt was then faced either with the proposition that the tablets

labeled to contain 23 mcgs. did not contain that amount or that the extraction of the estradiol had been incomplete. In order to test that, they ground up tablets, the placebo tablets, stated to be of the same composition as the previous lot with the exception of the estradiol being omitted, and to those ground up tablets he added a specific known amount of estradiol, 20 mcgs. to the material. 20 mcgs. was selected instead of 22 because the standard solution is made up to 200 mcgs. and that figure was selected purely as a matter of convenience. He might just as well have taken 30 or 15. It was a figure selected as being easily measured and approximating the 23. [R. 245.] Referring again to Exhibit I by following the U.S.P. procedure in the test of the placebo tablets, as shown by the fourth column, 10.1 mcgs. of estradiol were recovered or 50% of the amount originally put in. After correcting for the known loss of 27½% the mcgs. recovered amounted to 13.8 mcgs. instead of 20, or 69%, meaning a loss of 31% estradiol which could not be accounted for and it was his conclusion that all of the estradiol was not recoverable when held in excipients of the sort found in those tablets when following the U.S.P. method.

The last horizontal column represents an attempt to demonstrate the presence of more estradiol than was possible under the U.S.P. method. In that test he ground the tablets containing the estradiol, some of the same tablets tested in the test represented by the third horizontal column. He ground sufficient tablets to contain 233 mcgs. A sample of 23 mcgs. was then used, placed in a Soxhlet extracting device and extracted continuously with ether for 12 to 18 hours. The ether extraction was processed and the color developed and it was shown that 16.4 mcgs. was recovered as shown by the 4th vertical column, or

71.2% recovered. They were not retained to devise an assay method but simply to utilize the one at hand and they did not calculate the inherent loss though there would be such a loss. The 16.4 mcgs. recovered represented the minimum amount of estradiol which could possibly be present. Even without correction, by using that type of extraction, he was able to recover more estradiol from the tablets than under the U.S.P. method after correcting for loss under the latter method. Therefore it was his conclusion, based upon the assays conducted, that some factor or factors in connection with that test prevented recovery of the estradiol quantitatively. [R. 245-247.] His conclusions would not have been any different had the tablet been 22 mcgs. The deviation would be insignificant. In his opinion it is possible for a tablet such as the ones involved in this case to contain the labeled potency of 22 mcgs. and still on U.S.P. assay show materially less because something in the excipient prevents the estradiol from being extracted. He has not investigated the cause of the difference but in his opinion it would be due to extraction procedure rather than the subsequent purification. When a tablet of this sort contains a good deal of insoluble material, is shaken with a mixture of chloroform and water, there will be variable amounts of emulsions present. This emulsion will vary depending on how briskly the separators are shaken and the emulsion contains both chloroform and water in addition to the inert particulate matter around which it is built. It may be presumed that the chloroform present in the emulsion has extracted estradiol the same as the other chloroform has before the emulsified layer is allowed to break, but it is very difficult for these emul-

sions to break completely when there is so much extraneous material present. Therefore any estradiol that remains in the emulsion will be discarded and will not appear in the final assays. Then also is the problem of the estradiol being dissolved on the surfaces of some of the small particles of insoluble material, the excipients, which is a very important factor. [R. 248-251.] The estradiol that he used in the test and which was put into the placebo tablets was received from Crest Laboratories and labeled "Estradiol—U.S.P." [R. 252.] These tests were conducted at the Cedars of Lebanon Laboratories. Dr. Hoyt and his associate, Dr. Sobel, ran the tests together, 3 in all, each running a test and then comparing results. [R. 253, 254.] The 3 tests were in substantial agreement with each other. [R. 255.] They did not check back on the residue to see whether there was any estradiol left. They simply ran the test according to the U.S.P. method which does not provide for such tests of the residue. [R. 256.] They were dealing with the U.S.P. method and they followed it rather than some other method and the U.S.P. method is not one that he would select if he were interested in assaying estradiol. [R. 257.] In analytical chemistry it is true that chemists adopt particular extraction procedures to the particular substances they are dealing with depending on the quantity and the amount of substances to be analyzed, but when a particular method of assay is prescribed and to be followed, then that method alone is followed without deviation. [R. 258.] He made no investigation as to why some of the estradiol was unextractable. He simply demonstrated that it occurred when the U.S.P. method was followed. [R. 258.]

With regard to the placebo tablets to which he added the estradiol [see 4th horizontal column, Ex. I] the ex-

cipients in the tablet accounted for 23½% loss of estradiol in addition to 27½% that they knew was going to be lost as demonstrated by tests referred to in horizontal column No. 2. [R. 259.] The reason that they did not check back or assay the residue to determine whether any estradiol was left in it was because it did not seem to him that that was part of the problem. The question was whether the U.S.P. method accurately revealed the amount of estradiol present. To devise a new method different than the U.S.P. method was a different problem which did not appear to him to be material. [R. 260, 261.]

The U.S.P. method does compensate for a loss in assay procedure of pure estradiol with the excipients but it does not account for any loss which would be peculiar to the product—the finished tablet itself—and there is no reason why a competent chemist should not be able to follow an assay procedure which is written out and do so accurately providing the method is suitable to the assay of a product at hand. He made no studies as to the presence or the disappearance of any particular excipient in following the test. The one thing that they considered was whether they got back all of the estradiol they added and they found that they did not. If excipients were present in the substance which was to be read at the end of the assay they would not, generally speaking, make the readings higher. The U.S.P. method does provide for a correction factor but from the tests and experiments made by him he was convinced that this fact is far from an established phenomenon. [R. 262.]

Answering questions of the Court he stated that he thinks that there are methods which could be applied to a 22 mcg. product and an assay accordingly be done. He would not say exactly how it could be done. They did

demonstrate that they could recover more by another method, that shown on Exhibit I in the 5th horizontal column, than could be recovered by following the U.S.P. method. He did not assay the actual tablets involved in the litigation. Had they been submitted to him he thinks an analysis or assay could have been made to determine the exact amount of estradiol. Perhaps this would be a biological assay. He is sure it could be done. [R. 263.] By biological assay he means injecting some of the material into an animal to determine the response. This is a very sensitive test but has a greater error with a dissolvable liquid. [R. 264.]

Dr. Harry Sobel, head of the Department of Biochemistry, Cedars of Lebanon Hospital, testified as follows [R. 264]:

B. A. degree in chemistry 1938, Temple University; M. S. degree in organic chemistry, University of Pa. 1940; Ph. D. degree in Bio-chemistry, McGill University, Montreal, Canada, 1946; Research Assistant, Abbott Laboratories, Philadelphia 2½ years; Assistant Chemist in charge clinical chemistry laboratory, Jewish Hospital, Brooklyn; lectured in bio-chemistry McGill University, 3 years; head Baird Foundation Fellowship, Cornell Medical College, New York, where he spent a year [R. 265]; associate on the Donnor Foundation Grant for a year and a half; at Beth Israel Hospital, New York; has been at Cedars of Lebanon in his present capacity for nearly 3 years. His major interests have been steroids, endocrinology and clinical chemistry. Steroids refer to a group

of compounds which go into the making of certain hormones and steroids.

He has written 13 scientific papers, 8 of which directly or indirectly have to do with the subject of steroids, estrogen or estradiol. [R. 266.] The assays testified to by Dr. Hoyt were all performed by Dr. Hoyt and himself. If he were asked the same questions as Dr. Hoyt his answers would be substantially the same. However, he could expand on some. [R. 267.] In his opinion the U.S.P. method should not be described as one to assay alpha estradiol because with that procedure as found in U.S.P., estrone, and particularly estrol, could be determined and mistaken for alpha estradiol. Estrol is removed by the U.S.P. procedure so the designation of the U.S.P. procedure as one for the determination of alpha estradiol is incorrect. There are 3 sources of loss in determining alpha estradiol in the U.S.P. procedure. [R. 268.] There will be a small amount of loss due to the seepage of chloroform through the stop cock at the bottom of the separatory funnel. [R. 269.] There will be a small amount of material unextracted in the aqueous phase of the test. If there is a substance one is partitioning between two phases, like water and chloroform, a certain partition ratio will be set up. This ratio will be maintained so that there will always be something remaining behind and this is another source of loss.

Next in one stage of the assay an alkaline solution is extracted. Here the column is subject to very rapid destruction and alkaline solutions of alpha estradiol are

very easily oxidized and if followed for any length of time will be destroyed. This is another source of loss. Ultra violet rays will attach alpha estradiol, dissolve it and cause additional destruction of it and this is another source of loss. Therefore it is not at all surprising if only 72½% of the pure estradiol could be recovered through the U.S.P. method. In fact that amount of recovery is very satisfactory. [R. 270.] The U.S.P. procedure recognizes a loss and therefore requires the standard solution such as shown by the 2nd horizontal column on Exhibit I to be carried out. In the case of assaying the tablet there is an emulsion formed that does not occur when the pure standard is assayed. [R. 270.] Though the U.S.P. procedure provides for 4 extractions in the assay of the tablet, it is still very likely that a certain amount of the excipient material is entrained in the emulsion. Experiments conducted by him in the past with similar material showed that that happened. Therefore the emulsion seriously interferes with the extraction of alpha estradiol. [R. 271.] This tablet, among other things, contains starch. Starch may absorb itself into some of the material and not be extracted with the chloroform. Techniques established in the past which Dr. Sobel described show this to be a fact. [R. 272.] This explanation was given by Dr. Sobel. [R. 272-274.]

In the final analysis, therefore, there are two sources of loss of alpha estradiol which are not compensated for in the U.S.P. method. Those two methods are the emulsion and absorption. [R. 274.] With a tablet containing

between 100 and 200 gamma of estradiol and assuming a certain loss would take place in extracting estradiol from such a tablet, if simply 5 or 6 gamma were lost it would play no role in the final determination, but in the case of a tablet containing but 23 gammas, for example, such as the tablets involved here, a loss of 6 gamma by virtue of emulsion and absorption become appreciable. It is therefore in his opinion possible for a tablet such as the one involved here to contain 22 mcg. of alpha estradiol and still by following the U.S.P. procedure show materially less. [R. 275.]

He conducted no experiments to determine actually that the losses occurred which he testified about but it is his opinion, based upon his experience, that such a loss occurred. [R. 275, 276.] However, he does know, as shown by Defendants' Exhibit I in the 4th horizontal column, that when they took a placebo tablet and added 20 mcgs. of alpha estradiol there was lost in the procedure 31% of the estradiol after correcting for the amount that they knew they were going to lose of 27½%, which they demonstrated by the test shown in horizontal column No. 2. [R. 276.] In any work that he has done with estrogen it has been absolutely imperative to avoid contact with alkali for any length of time and alkali is involved in the U.S.P. procedure. [R. 278.]

ESTRADIOL TABLETS.

Tabellæ Estradiolis.

Estradiol Tablets contain not less than 90 per cent and not more than 115 per cent of the labeled amount of $C_{18}H_{24}O_2$.

LIMIT OF BETA-ESTRADIOL—Proceed as directed in the test for *Limit of beta-estradiol* under *Estradiol,* page 225, but use aliquots of the benzene solutions prepared in the *Assay* below, each equivalent to 20 micrograms of estradiol.

WEIGHT VARIATION—Estradiol Tablets meet the requirements of the *Weight Variation Test for Tablets,* page 799.

ASSAY—Weigh a counted number of not less than 20 Estradiol Tablets, and reduce them to a fine powder without appreciable loss. Weigh accurately a portion of the powdered tablets, equivalent to 0.2 mg. of estradiol, and transfer to a 125-cc. separator containing 25 cc. of water, 1 cc. of alcohol, and 5 cc. of diluted sulfuric acid.

Dissolve 10 mg. of U. S. P. Estradiol Reference Standard in alcohol to make exactly 50 cc. Transfer exactly 1 cc. of the solution to a 125-cc. separator containing 25 cc. of water and 5 cc. of diluted sulfuric acid.

Treat each of the above aliquots in an identical manner as follows: Extract solution with four 20-cc. portions of chloroform. Evaporate the combined chloroform extracts to about 5 cc., add about 25 cc. of petroleum ben-

zin, and transfer the solution to a 125-cc. separator with the aid of several small portions of petroleum benzin. Add 10 cc. of sodium hydroxide solution (1 in 10), shake vigorously for 2 minutes, and allow to separate completely. Transfer the water layer to a second 125-cc. separator containing 5 cc. of carbon tetrachloride, avoiding transfer of any insoluble matter at the interface. Repeat the extraction with two additional 10-cc. portions of the sodium hydroxide solution, and discard the petroleum benzin layer. Shake the alkaline solution vigorously with the carbon tetrachloride and allow to separate. Draw off the carbon tetrachloride layer into another separator, and wash it with 5 cc. of the sodium hydroxide solution. Discard the carbon tetrachloride, and add the alkaline wash to the main sodium hydroxide extract. Complete the alkaline extractions promptly. Render the combined alkaline solutions acid to litmus paper by the addition of dilute sulfuric acid (1 in 2), cool, and shake vigorously with 20 cc. of benzene. Redistil the benzene to be used if the residue from 5 cc. produces a turbidity with the iron-phenol reagent. Transfer the water layer to another separator, and extract with a second 20-cc. portion of benzene. Wash the benzene solutions in the two separators, successively, with two 5-cc. portions of sodium carbonate T. S. and two 5-cc. portions of water, drawing off the last wash as closely as possible. Drain the first benzene extract into a dry 100-cc. beaker, sprinkle into it about 1 Gm. of anhydrous sodium sulfate, and swirl until the benzene is entirely

clear. Decant the benzene into a 50-cc. volumetric flask avoiding transfer of any of the sodium sulfate. Rinse the first separator with the second benzene extract, clarify the benzene over the sodium sulfate, and add to the flask. Wash the separators and the beaker with two 4-cc. portions of benzene, add the clarified washes to the flask, and add benzene to make exactly 50cc. In the benzene extractions a slight turbidity persisting after 5 minutes standing may be ignored if the interface is sharply defined.

Transfer in duplicate to dry 18 × 150-mm. test tubes, accurately measured aliquots of the benzene solution, equivalent to 20 micrograms of estradiol. Add a few small pieces of silicon carbide to each tube, and evaporate the solvent on a steam bath without the aid of a current of air, until the ebullition from the silicon carbide just stops. Instantly remove the tubes, wipe them dry quickly, and transfer to an efficient desiccator connected to a vacuum line. Keep the tubes in the desiccator for 1 hour.

To each tube and to a blank tube add a glass bead, and measure into each tube from a burette 1 cc. of the iron-phenol reagent prepared for the test for *Limit of beta-estradiol* under *Estradiol,* page 225, quickly wiping the outside of the burette tip with a piece of absorbent paper before each addition. The burette stopcock must be lubricated only with reagent. The burette should be fitted with a guard tube to exclude moisture and should deliver 1 cc. of the iron-phenol reagent in 30 seconds or less. Immediately close the tubes with rubber finger stalls, and

allow to stand for 30 minutes, shaking the tubes vigorously at 5-minute intervals. Place the tubes in a boiling water bath for 35 minutes, shaking each tube for a few seconds after the first 5 minutes. Transfer to an ice bath for 2 minutes, then remove, and add from a burette exactly 4 cc. of sulfuric acid solution, made by cautiously adding 35 volumes of sulfuric acid to 65 volumes of water. Allow to stand for 5 minutes and mix thoroughly by shaking, first gently, then vigorously. Measure the absorbancies of the solutions of the sample and of the Reference Standard relative to the blank at 525 mμ and at 420 mμ, making any necessary corrections for cell variation.

The quantity, in micrograms, of $C_{18}H_{24}O_2$ in the aliquot used is calculated from the following formula, *A* representing the reading of the absorbancy:

$$20 \times \frac{A\ 525\ \text{m}\mu\ \text{sample} - A\ 420\ \text{m}\mu\ \text{sample}/2}{A\ 525\ \text{m}\mu\ \text{standard} - A\ 420\ \text{m}\mu\ \text{standard}/2}.$$

No lubricants, other than water, shall be used on the stopcocks of the separators in the above assay.

PACKAGING AND STORAGE—Preserve Estradiol Tablets in well-closed containers.

TABLETS AVAILABLE—Estradiol Tablets usually available contain the following amounts of estradiol: 0.1 and 0.2 mg. (1/600 and 1/300 grain).

USUAL DOSE OF ESTRADIOL—0.2 mg. (approximately 1/300 grain).

STATUTORY PROVISIONS INVOLVED

21 U. S. C. 321(g)(2).

"The term 'drug' means * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; * * *"

21 U. S. C. 331.

"The following acts and the causing thereof are hereby prohibited. (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

21 U. S. C. 333.

(a) "Any person who violates any of the provisions of section 331, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000.00, or both such imprisonment and fine; * * *"

21 U. S. C. 352.

"A drug or device shall be deemed to be misbranded —(a)if its labeling is false or misleading in any particular."

21 U. S. C. 351.

"A drug or device shall be deemed to be misbranded— (c) if it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below that which it purports or is represented to possess."

21 U. S. C. 351.

"(b) If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls

below, the standards set forth in such compendium. Such determination as to strength, quality or purity shall be made in accordance with the test or methods of assays set forth in such compendium, except that whenever tests or methods of assay have not been prescribed in such compendium or such tests or methods of assay as are prescribed are, in the judgment of the Administrator, insufficient for the making of such determination, the Administrator shall bring such fact to the attention of the appropriate body charged with the revision of such compendium, and if such body fails within a reasonable time to prescribe test or methods or assay which, in the judgment of the Administrator, are sufficient for purposes of this paragraph, then the Administrator shall promulgate regulations prescribing appropriate tests or methods of assay in accordance with which such determination as to strength, quality, or purity shall be made. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality, or purity thereof set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. Whenever the drug is recognized in both the United States Pharmacopoeia and the Homoeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homoeopathic drug, in which case it shall be subject to the provisions of the Homoeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia."

No. 13259

IN THE

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FOR THE NINTH CIRCUIT

WOODARD LABORATORIES, INC., DEAN D. MURPHY and JOHN L. SULLIVAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Appellants,

vs.

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Appellee.

APPELLEE'S BRIEF.

I.

Statement of Jurisdiction.

Pursuant to 21 U. S. C. 331(a), 21 U. S. C. 333(a), and 18 U. S. C. 3231, the District Court had jurisdiction to try the defendants-appellants.

Under 28 U. S. C. 1291, this Court has authority to review the judgment of the District Court.

II.

Statement of Facts.

A. Summation of Case.

The Information filed in this case charges the defendants in ten counts with violations of the Federal Food, Drug, and Cosmetic Act, resulting from the interstate shipment of certain drugs alleged to be adulterated and misbranded. [R. 3.] The ten counts involve a

total of five interstate shipments of the drug "Estrocrine" whose strength, the Information charged, was below that declared on the labels; each shipment is the basis for two counts, one relating to misbranding and one to adulteration.

Upon arraignment, each defendant entered pleas of not guilty to each of the ten counts. [R. 21-22.] Each defendant filed a waiver of jury. [R. 22-25.]

After a two-day trial before the Court sitting without a jury, each of the defendants was found guilty on Counts 1, 3, 5, 7, and 9, and not guilty[1] on Counts 2, 4, 6, 8, and 10. [R. 344.] On December 3, 1951, the District Court sentenced the defendants: Woodward Laboratories, Inc., to pay a fine of $500 on each of Counts 1, 3, 5, 7, and 9, or a total fine of $2500 [R. 28]; Dean D. Murphy to pay a fine of $50 on each of Counts 1, 3, 5, 7, and 9, or a total fine of $250 [R. 29-30]; and John L. Sullivan to pay a fine of $50 on each of Counts 1, 3, 5, 7, and 9, or a total fine of $250. [R. 31.]

On December 5, 1951, each of the defendants filed a Notice of Appeal. [R. 32-33.]

B. The Government's Evidence.

Most of the facts upon which this case was based are undisputed and are covered by the Stipulation of Facts. [Ex. 1 and R. 354.] The admitted facts eliminated any issue as to the interstate shipments, the making of

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[1]The reason for the Court's not guilty verdict on the even numbered counts was explained by the Court [R. 344]:

> "And while, of course, they are technically guilty, insofar as the even-numbered counts are concerned, inasmuch as they are dependent upon the same facts . . . they are found not guilty inasmuch as they may not be found guilty of two offenses which are dependent upon the same facts."

the shipments by the defendants, the identity of the labels, and the identity of the samples obtained and analyzed by the Government.

At the trial, only one issue remained: Was the strength of these drugs below that which is declared on their labels?

Each of the five counts on which the defendants were found guilty is predicated upon a different shipment of the drug "Estrocrine." A typical label states in pertinent part: "Each tablet contains: 0.022 mg. alpha estradiol." [R. 4 and 354.] The Government's evidence established that the tablets actually contained far less than this declared amount of alpha-estradiol.

Both Government witnesses are outstanding authorities in the field of pharmaceutical chemistry. Jonas Carol has been a chemist with the United States Food and Drug Administration for 21 years, and he is Chief of the Synthetic Branch of the Division of Pharmaceutical Chemistry. [R. 36.] Practically all of his work has been in the analysis of drugs and in the development of methods for their analysis; during the past six years he was engaged almost exclusively in developing methods of analysis for estrogenic hormones. [R. 36.] Alpha-estradiol, the active ingredient of the drug here in question, is one of the estrogenic hormones. [R. 38.]

Mr. Carol gives instruction on methods of hormone analysis to many chemists who come to study with the Food and Drug Administration; these chemists are sent by commercial pharmaceutical houses, educational institutions, and domestic and foreign law enforcement agencies. [R. 36-37.] He has had 22 papers published in scientific journals on drug chemistry and the chemistry of hormones. [R. 36.] He is frequently called to participate

in the granting of doctors' degrees at Georgetown University, passing upon theses submitted by candidates in the fields of hormone chemistry or spectrophotometric analysis. [R. 36-37.]

During his association with the Food and Drug Administration, he has analyzed many thousands of drugs, of which about 1000 were drugs containing alpha-estradiol. [R. 37-38.]

Mr. Carol and his associates, after doing experimental work, wrote the method of assay for alpha-estradiol in tablets that was published in the volume called United States Pharmacopoeia XIV, which is the latest revision of that compendium. [R. 38-39.] Known as the U. S. P., it is published by the United States Pharmacopoeial Convention[1a] which meets periodically, and has standing committees that develop standards for drugs and write monographs describing the drugs and the tests that are made to establish their purity and composition. [R. 38.]

The U. S. P. is recognized as an official compendium by the Federal Food, Drug, and Cosmetic Act. [21 U. S. C. 321(j), 351(b), 352(e), and 352(g).]

In addition to the method of assay for alpha-estradiol published in U. S. P. XIV, there are a number of other common procedures for determining the amount of alpha-estradiol present in a tablet. [R. 40.] All of the methods involve two major steps: (1) the *extraction* of the alpha-estradiol from the excipients (inert ingredients) with which it is entableted, and (2) the *measurement* of the extracted alpha-estradiol. [R. 39-40.]

[1a]The history and objectives of this non-governmental organization are described in "History of the Pharmacopoeia," by E. Fullerton Cook, Food, Drug, and Cosmetic Law Quarterly, Vol. 1, No. 4, p. 518 (C. C. H., December, 1946).

The principles involved in the extraction process for alpha-estradiol have been used for at least 50 years, and, as described in a book published in 1920, they are essentially the same as those in U. S. P. XIV. [R. 41, 281-282.] The earliest method for the measurement of alpha-estradiol was published in 1933. [R. 41 and 282.] The U. S. P. XIV method is an adaptation and refinement of the earlier methods of extraction and measurement [R. 41], and can be used with relatively simple equipment. [R. 293.]

Mr. Carol assayed samples taken from all five of the shipments upon which the Information was based, using the infra-red method of analysis because it gives both qualitative and quantitative results at the same time, and because he wished to double check on the U. S. P. method that was used by other chemists with the Food and Drug Administration in analyzing samples from these shipments. [R. 42-43, 299.] Mr. Carol conducted special extraction and experimental procedures to assure complete extraction of the alpha-estradiol in these tablets. [R. 43-45, 300-301.] *His assays established that the amount of alpha-estradiol actually present per tablet in the five shipments involved ranged from 23% to 68% of the amount declared in the label* or, put another way, *from 32% to 77% below the declared amount.* [R. 42-47.][2]

Under the supervision of Mr. Carol, Dr. Edward Haenni, an associate of Mr. Carol's who worked with him in the development of the U. S. P. method, used that method to analyze samples taken from three of the

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[2]A breakdown of Mr. Carol's findings with respect to each sample he analyzed appears in the Appendix as Appendix A.

shipments in question. [R. 47-48, 50.] *Dr. Haenni found that the alpha-estradiol content of the tablets in those three shipments ranged from 32% to 63% of the amount declared in the label* or, *from 37% to 68% below the declared amount.* [R. 48-49.][3]

Dr. Daniel Banes has been a chemist with the Food and Drug Administration since 1939, specializing in drug analysis since 1940, and doing his chief work since 1948 in research on the analysis of estrogenic hormone preparations. [R. 51.] He is employed in the Division and Branch that is headed by Mr. Carol. [R. 51.] That group succeeded in isolating three new female sex hormones related to alpha-estradiol. [R. 52.]

Dr. Banes' Ph. D. thesis dealt with a specific type of estrogenic hormone. [R. 52.] He has written 12 papers on drug analysis, and the later papers have been devoted to estrogenic hormones. [R. 52.] He is a referee on estrogenic synthetic hormones for the Association of Official Agricultural Chemists, and he has delivered papers dealing with estrogenic hormones before the American Chemical Society. [R. 53.]

In developing the U. S. P. method, Dr. Carol's group tested a large number of samples containing various amounts of alpha-estradiol, and concluded that this method would give complete extraction and permit an accurate assay of the alpha-estradiol present. [R. 54.] These samples included a number of commercially prepared tablets containing approximately 22 micrograms[4] of alpha-

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[3]A breakdown of Dr. Haenni's findings with respect to each sample he analyzed appears in the Appendix as Appendix B.

[4]Note that 22 micrograms are the equivalent of 0.022 milligrams, the alpha-estradiol potency claimed for the tablets in this case. [R. 68.]

estradiol per tablet. [R. 283-284.] In their investigational work, they made certain that the alpha-estradiol present in a preparation would be extracted no matter what the mixture was. [R. 55.]

Dr. Banes assayed samples taken from all five of the shipments in question, using the U. S. P. method; *his assays establish that the amount of alpha-estradiol actually present per tablet ranged from 30% to 73% of the amount declared in the label* or, *from 27% to 70% below the labeled potency.* [R. 53-61.][5] Dr. Banes conducted extensive special extraction and experimental procedures to verify that his findings accurately reported the alpha-estradiol content of these tablets. [R. 55-56, 58-60, 61-62.]

C. The Defendants' Evidence.

Defendant John L. Sullivan is general manager of defendant corporation, Woodard Laboratories, Inc. [R. 67.] Woodard Laboratories itself did not manufacture the tablets in question but ordered them made by Crest Laboratories. [R. 68-74.] Woodard furnished Crest with the alpha-estradiol used in the manufacture of the tablets. [R. 75.]

The five shipments here involved came from a total of three lots of tablets made by Crest; each lot contained tablets of two potencies—22 micrograms and 110 micrograms. [R. 68-71.] Woodard received these tablets from Crest in bulk form and then packaged, labeled, and shipped them as stipulated. [Ex. 1; R. 71.]

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[5]A breakdown of Dr. Banes' findings with respect to each sample he analyzed appears in the Appendix as Appendix C.

Although defendants had been having this drug manufactured at least since *April, 1949,* they made no effort to have any assay or analysis of its potency made by any laboratory until late in *May, 1950,* and then only *after* receiving notice of hearing from the Food and Drug Administration (pursuant to 21 U. S. C. 335) stating that samples had been obtained from these shipments and found below the labeled strength. [R. 72, 74, and 75-77.]

Harry Rosenzweig is a production chemist employed by International Hormones, Inc., of Brooklyn, New York. [R. 78-79.] That firm manufactured the alpha-estradiol which Woodard purchased and ordered sent to Crest to be used in manufacturing the tablets that are the subject of this case. [R. 78-82, 75.] The alpha-estradiol which Woodard thereby obtained apparently came from three different lots manufactured by International Hormones although one order by Woodard was filled from the stock of one Silas, the California representative of International Hormones, and Mr. Rosenzweig had no personal knowledge that Silas filled this order from any batch about which he was testifying. [R. 81, 87-88, 96-97.] Silas was not called as a witness. Mr. Rosenzweig testified in his deposition that he made certain analyses regarding one of those lots to determine the "melting point" and the "optical rotation," but did not have complete records with him. [R. 80-82, 87.] He did not know who made the analyses of the other two shipments. [R. 87.]

Joseph G. Galindo is vice-president of Crest Laboratories and was the firm's production manager at the time it manufactured the instant tablets for Woodard. [R. 98.] Mr. Galindo claimed, and identified work-

sheets which purported to show, meticulous care by Crest in manufacturing the tablets for Woodard. [Exs. B-H, incl.; R. 107-115.]

Upon cross-examination, however, something considerably less than the meticulous care claimed was demonstrated. In a number of instances, the worksheets did not bear any initials which would show who performed certain alleged operations. [R. 133-135.] Mr. Galindo had testified that there was always a manufacturing loss in the tableting process, yet was compelled to admit that certain worksheets [Exs. F and G] showed no such loss. [R. 153.] Nor could he explain the *gain* in weight between the granulating and the tableting process shown in Exhibit G, and "surmised" that this was an error. [R. 154.] He could not explain why Exhibit H did not show the weight after tableting although this was the one batch which he had testified was made directly under his supervision and that of two other members of his staff. [R. 136-137.] Exhibit H declares "Batch size 7,000" but actually represents 14,000 tablets—7,000 with alpha-estradiol and excipients, and 7,000 with excipients alone. [R. 138-139.] And although Mr. Galindo testified two separate batches were made, only one worksheet was used with but one set of computations. [R. 138-139.]

Something is lost in the course of the manufacturing process, and Mr. Galindo did not know whether that something was the alpha-estradiol. [R. 134, 140-141.] The alpha-estradiol used in manufacturing a batch of 110,000 tablets weighs about one-ninth to one-tenth of an ounce. [R. 154.] Basing his opinion upon visual observation rather than scientific assay, Mr. Galindo stated

he did not believe that the manufacturing loss could comprise a large part of the alpha-estradiol. [R. 155-156.] *He admitted that no laboratory assay or analysis was made by Crest Laboratories of any of these tablets.* [R. 132-133.]

Don Carlos Atkins is director of laboratories of Crest Laboratories, having been employed by the firm in July, 1950. [R. 157.] Mr. Atkins testified that a number of the excipients (inert ingredients which give a tablet bulk and shape) present in the tablets here involved could "interfere" with the light readings contemplated by the U. S. P. method of assay. [R. 159-172.] However, he declared that this "interference" would give a *higher* reading of alpha-estradiol than was actually present in the tablets. [R. 164, 169-173.] He believes the U. S. P. method is not suitable for the assay of these tablets. [R. 179.]

The first contact Mr. Atkins had with *any* alpha-estradiol was at the Crest Laboratories where he did not begin working until July of 1950. [R. 181-182.] After some uncertain testimony, he reiterated his earlier statement that the interference, if any, caused by the excipients would give a *higher* reading of alpha-estradiol, which would indicate a higher potency than the tablet actually had. [R. 184-187, 192, 198.]

Under cross-examination, Mr. Atkins stated he had made no analysis of the tablets involved in this case. [R. 180.] When the Court asked him whether he carried out any experiments "with these particular tablets," he replied, "No, sir, I did not." [R. 201.] However, when the Court pressed this inquiry, he admitted that he did do some experiments on these tablets "with the U. S. P.

procedure, and we were unable to obtain a reading at all." [R. 201.] Upon further probing by the Court, it developed that when Mr. Atkins said, *"we were unable to obtain a reading at all,"* he meant that he *"came out with a greater quantity of estradiol"* than was actually supposed to be in the tablets. [R. 202.]

Dr. C. E. P. Jeffreys is a consulting chemist and technical director of Truesdail Laboratories, Inc. [R. 203.] Prior to July, 1950, he was asked by Crest Laboratories to run an assay of the estradiol content of some tablets but refused to do it because he didn't feel there was any acceptable method for commercial testing. [R. 204-205.] However, in July of 1950, he received an advance copy of U. S. P. XIV, and he then agreed to assay the tablets in question for Woodard by the U. S. P. procedure. [R. 204-205.] His assay was limited to a sample from but one of the three lots in question. [R. 218.] His first results showed the presence of 8.1 micrograms, whereas subsequent readings showed 9.5 and 9.1 micrograms. [R. 205-206, 219-220.] He believed that the U. S. P. method of assay did not extract all of the alpha-estradiol present in such a tablet and was not a suitable method. [R. 214-215.]

On direct examination, Dr. Jeffreys advanced the theory that a substantial amount of alpha-estradiol in these tablets adhered to the surfaces of the excipients and was not separated from those surfaces by the U. S. P. method of assay. [R. 207-215.] On cross-examination, however, he admitted he really didn't know whether the alpha-estradiol would stick to the surfaces of any of the excipients in these tablets. [R. 222.] He conceded it was possible that the reason he got low results was that there

was no more alpha-estradiol present in the tablets. [R. 223.] (On rebuttal, Mr. Carol testified that if some of the alpha-estradiol were adsorbed in the initial process of the U. S. P. procedure, it would be extracted in the subsequent stages; he knew this to be a fact from his experimental work. [R. 295.])

Dr. Jeffreys testified that a chemist should check his results by running an assay on a blank tablet alongside that of the estradiol tablet [R. 211-212], but he admitted he ran no assay on a blank tablet and made no re-extractions to check his results. [R. 221.]

This was Dr. Jeffreys' first assay of alpha-estradiol tablets. [R. 226, 204-205.] He did not believe there was any method known to science that is suitable for the assay of a tablet represented to contain 22 micrograms of alpha-estradiol. [R. 227-228.]

Dr. Robert Ellis Hoyt is employed in the division of laboratories in the Cedars of Lebanon Hospital. [R. 229.] His major work has been in bacteriology, urinology, and pathology. [R. 230.] He has taught these subjects in a number of schools. [R. 230-233.] He has published about 35 papers, only one of which he would say is in a field related to estradiol. [R. 233.]

At the request of Woodard Laboratories, Dr. Hoyt made certain assays of tablets furnished by Crest; these included "placebo tablets" and tablets alleged to contain 23.3 micrograms of alpha-estradiol. [R. 234, Ex. H.] He testified he made a total of four assays, three of which were U. S. P.

Dr. Hoyt's first assay involved the use of "pure estradiol" to check the method of assay; beginning with 20 micrograms of estradiol, he stated he recovered only

14.5 micrograms by the U. S. P. method. [R. 239-240.] His second assay involved the tablets represented to contain 23.3 micrograms of alpha-estradiol; he stated he recovered only 10.1 micrograms by the U. S. P. procedure. [R. 243.] His third assay involved adding 20 micrograms of alpha-estradiol per tablet to blank or "placebo" tablets; he stated he recovered only 10.1 micrograms. [R. 245.] His fourth assay involved the tablets represented to contain 23.3 micrograms of alpha-estradiol; he stated he extracted 16.4 micrograms by an assay procedure which modified the U. S. P. method. [R. 246-247.]

Dr. Hoyt concluded it was not possible to recover all of the alpha-estradiol by the U. S. P. method when it was held in excipients of the sort that were found in these tablets. [R. 245-246, 248-249.]

On cross-examination, it was brought out that Dr. Hoyt's background has been primarily in bacteriology and pathology; while he was once employed as a biochemist, he did not run assays on estrogenic hormones. [R. 249-250.] None of the papers he wrote dealt with estrogenic hormones. [R. 250.] He ran three different sets of assays but brought his work sheets on only one of those sets to court. [R. 253-255.] He did not use the U. S. P. Reference Standard of alpha-estradiol in running his first assay. [R. 252.] (The U. S. P. Reference Standard of estradiol is of proven purity, comes sealed, may be obtained from the U. S. P. at Philadelphia, and assures the investigator he is using a very high grade of estradiol. [R. 291-292.])

In doing his assays, Dr. Hoyt did not check back on the excipient mass at any time to determine whether any

alpha-estradiol was in fact left there, saying "that didn't seem to be relevant." [R. 255, 258.]

Dr. Hoyt had not run any U. S. P. assay on alpha-estradiol before making these analyses. [R. 256.] *In fact, this was the first time he had analyzed an alpha-estradiol tablet by any method.* [R. 259.]

Dr. Hoyt advised the Court he was sure that the exact amount of alpha-estradiol in the tablets here involved could be determined, but that none of *these* tablets had been submitted to him for an analysis. [R. 263.]

Dr. Harry Sobel is head of the department of biochemistry at the Cedars of Lebanon Hospital. [R. 264.] His major interests have been steroids, endocrinology, and clinical chemistry. [R. 265.] He has written 13 papers, of which he stated eight have something to do with the subject of steroids or estrogen or estradiol, directly or indirectly. [R. 266.] He and Dr. Hoyt together conducted the assays about which Dr. Hoyt testified. [R. 266.]

Dr. Sobel believes the U. S. P. procedure for alpha-estradiol extracts not only alpha-estradiol but also beta-estradiol and estrones. [R. 267.] (However, the Government's rebuttal witness, Mr. Carol, testified that if this were true, the final reading would be higher. [R. 287.])

Dr. Sobel described a number of stages in the U. S. P. assay of these tablets where he thought that loss of alpha-estradiol might occur. [R. 268-275.] However, he had done no experimental work to establish whether

any loss actually occurred at any of those places. [R. 275-278.]

After both sides had rested, and counsel for the Government had concluded his argument, counsel for defendants was permitted to reopen the case to introduce the deposition of Mrs. Elizabeth Adam Weiss. [R. 308.] Earlier, counsel had declared he would not offer this deposition because he was absolutely convinced that this chemist was not correct in her assay, in the way she did it, or in her conclusions. [R. 97, 302-303.]

On direct examination, Mrs. Weiss testified about three U. S. P. assays she made in September and November of 1950 with respect to samples of the tablets in question. She gave her results as ranging from 21.2 micrograms to 26 micrograms per tablet. [R. 315-317.]

On cross-examination, Mrs. Weiss testified that she made three other assays with respect to samples of these tablets in June of 1950. She gave her results as ranging from 10.5 micrograms to 17 micrograms per tablet. [R. 337-338.] She used the Carol-Moliter-Haenni method in making these assays, and in her opinion, the results obtained by this method should not vary much from the results obtained by the U. S. P. method. [R. 337, 341.]

On October 10, 1950, she wrote to Mr. Sullivan suggesting that the tablets were not mixed properly in the manufacturing process and therefore varied in their estradiol content. [Ex. 2.]

III.

Statutory Provisions Involved.

Federal Food, Drug and Cosmetic Act.

"21 U. S. C. 351. Adulterated drugs and devices.

A drug or device shall be deemed to be adulterated—

(c) If it is not subject to the provisions of paragraph (b) of this section, and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess."

"21 U. S. C. 352. Misbranded drugs and devices.

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular."

"21 U. S. C. 331. Prohibited acts.

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"21 U. S. C. 333. Penalties—Violation of section 331.

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine."

IV.
Question Involved.

Is there substantial evidence in the record to support the judgment of the District Court?

V.
Summary of Argument.

A. The Judgment of the District Court Must Be Sustained if There Is Substantial Evidence to Support It.

Appellants challenge the sufficiency of the evidence upon which they were convicted. The judgment of the trial court must be sustained if there is substantial evidence to support it, taking the view most favorable to the Government.

The Government did not rely upon circumstantial evidence, but solely upon demonstrable and direct evidence. Accordingly, the rule applicable with respect to circumstantial evidence is not pertinent.

B. The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial but Overwhelming.

The judgment of the trial court is supported by substantial evidence of the most compelling character.

Mr. Carol and Dr. Banes are concededly outstanding authorities in the field of hormones analysis, with special competence in the analysis of tablets containing alpha-estradiol. They analyzed the tablets in question by various methods of assay and found them seriously deficient in alpha-estradiol content.

Chemists who testified for the defense found comparable deficiencies in alpha-estradiol, but speculated that their results were caused by alleged defects in the U. S. P. method of assay rather than by actual deficiencies in the

tablets. None of the defense witnesses had had any extensive experience in assaying alpha-estradiol tablets, and for a number of them this was the first contact with such tablets. It developed that the alleged "defects" in the U. S. P. method of assay, even if they existed, would have tended to give a *higher* reading of alpha-estradiol and would therefore have been in the defendants' favor.

Appellants point to evidence regarding the manufacture of these tablets and assert it "conclusively" demonstrates the presence of 22 micrograms of alpha-estradiol per tablet. But such "evidence" was shown to be permeated with discrepancies, omissions, and admitted errors, and was completely discredited.

Appellants' attack upon the U. S. P. method of assay rests upon unfounded assumptions. Furthermore, the Government's testimony was based upon other methods in addition to the U. S. P. method, with practically uniform results.

C. The District Court Did Not "Misconceive" or "Misapply" Any Legal Principles.

The trial court at first excluded Exhibit H, a worksheet that purported to show how alpha-estradiol tablets *other than those here involved* were manufactured. But when defense counsel made it clear that he intended to use this worksheet, together with subsequent tests made upon such tablets, in attempting to attack the soundness of the U. S. P. method of assay, Government counsel withdrew his objection and the Court admitted the worksheet in evidence.

Appellants make a strained argument to the effect that the Court's initial refusal to admit this evidence shows

that the Court disregarded this line of evidence after it was admitted. There is no support in the Record for such a contention. Rather, the Record plainly establishes that the trial court gave special attention to this evidence as a result of which defense counsel sought and obtained permission to reopen the case after both sides had rested and after Government counsel had concluded his argument.

The Information charges that the drugs in question were adulterated within the meaning of 21 U. S. C. 351(c) because their strength was below that which they purported to possess.

Appellants suggest that portions of Section 351(b) are applicable and that this would require the determination as to the strength of these tablets to be made by the U. S. P. method of assay alone. But the U. S. P. did not recognize alpha-estradiol until *after* defendants made the shipments in question. Since Section 351(b) applies only when an official compedium such as the U. S. P. has recognized a particular drug at the time of the alleged violative act, it can have no application here.

Under Section 351(c), there is no restriction whatever as to the method of assay which may be employed.

D. Other Contentions Advanced by Appellants Are Also Without Merit.

The Government's witnesses used a number of sound procedures, including the U. S. P. method of assay, to obtain and verify their results. This is in keeping with fundamental principles of scientific investigation, and by no means indicates any flaw in the U. S. P. method.

Appellants are misinformed when they say that the $2500 fine imposed upon the corporate defendant is the

largest imposed upon any defendant in a food and drug case in 1951.

Persons who ship drugs interstate have the responsibility of ascertaining that their drugs are not in violation of the Federal Food, Drug, and Cosmetic Act since the innocent public is wholly helpless in such matters.

VI.

Argument.

A. The Judgment of the District Court Must Be Sustained if There Is Substantial Evidence to Support It.

The appellants were tried and convicted by the District Court sitting without a jury. Appellants now challenge the sufficiency of the evidence upon which they were convicted. Under such circumstances, the function of the Appellate Court is clear:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

Glasser v. United States (1942), 315 U. S. 60, 80;

McCoy v. United States (C. A. 9, 1948), 169 F. 2d 776, 787, cert den. 335 U. S. 898;

Karn v. United States (C. A. 9, 1946), 158 F. 2d 568, 569;

Kelling v. United States (C. A. 10, 1951), 193 F. 2d 299, 301-302;

Sharp v. United States (C. A. 6, 1952), 195 F. 2d 997, 998.

In Henderson v. United States (C. A. 9, 1944), 143 F. 2d 681, this Court said at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution . . ."

Appellants argue that "whether the evidence is sufficient to sustain the judgment depends upon whether all of the substantial evidence is as consistent with a reasonable hypothesis of innocence as with guilt." (App. Op. Br. p. 22.) Even if such a rule were applicable here, it would not help appellants since, as we shall demonstrate, none of the substantial evidence in this case is as consistent with a reasonable hypothesis of innocence as with guilt. But the rule, so heavily relied upon by appellants, has no bearing here. It is invoked only where a conviction is based upon circumstantial evidence. Thus in *Karn v. United States* (C. A. 9, 1946), 158 F. 2d 568, this Court observed on page 570:

> "*The prosecution relied entirely upon circumstantial evidence* for a conviction. It is sufficient to say that *under such circumstances* the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence . . . (Citing authorities.)" (Emphasis added.)

In the instant case, the prosecution relied solely upon demonstrable and direct evidence and not upon circumstantial evidence.

B. The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial but Overwhelming.

The judgment of the District Court, we submit, is supported by substantial evidence of the most compelling character. Appellants necessarily concede that the Government's witnesses are "men of unquestioned competence." (App. Op. Br. p. 7.) Mr. Carol and Dr. Banes are beyond question among the country's foremost authorities in the field of hormone analysis, with extensive experience in the analysis of tablets containing alpha-estradiol in varying potencies.

It was Mr. Carol and Dr. Banes who developed and adapted procedures for the assay of such tablets by the use of relatively simple equipment, procedures which were reviewed, accepted, and published by the United States Pharmacopoeia. [R. 38-39, 282-283.]

At the trial, the only issue was whether the Estrocrine Tablets shipped by appellants contained 22 micrograms of alpha-estradiol per tablet as declared in the label, or whether they contained a lesser strength as charged by the Government. Using a number of different methods of assay including the U. S. P. method, and repeatedly verifying, double checking, and confirming the accuracy of their results, the Government witnesses found the tablets to be seriously deficient in their alpha-estradiol content.

Significantly, those defense witnesses who analyzed the actual Estrocrine Tablets in question found com-

parable deficiencies.[6] (App. Op. Br. p. 23.) A number of chemists produced by the defense had not even assayed tablets taken from the shipments upon which the Information was based. [R. 180, 263, 266.] However, all of the defense witnesses[7] chose to attribute these deficiencies not to any real lack of alpha-estradiol in the tablets but to alleged defects in the U. S. P. method of assay.

Some of these defense witnesses had never before assayed alpha-estradiol tablets [R. 226, 259, and see 182], yet they advanced a multitude of reasons why they thought the U. S. P. method was not suitable for the assay of these tablets. One witness speculated that the excipients present in the tablets might "interfere" with the results, yet he admitted that such "interference," if any there were, would give a *higher* reading of alpha-estradiol and would therefore be in the defendants' favor. [R. 186.] Another witness thought that the U. S. P. method was not selective enough and would reflect not only alpha-estradiol, but also beta-estradiol and estrones. [R. 267.] If this were true, it would also give a higher alpha-estradiol reading and thus again favor the defendants. [R. 287.]

The Government's witnesses testified that the U. S. P. method had been most carefully developed after years of study and extensive experimental and commercial testing to assure complete extraction and accurate measurement

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[6]Of course, Elizabeth Weiss, one of the defendants' expert witnesses, found no deficiencies in one series of assays, but her testimony in this respect is subject to the serious infirmity that before being offered it was discredited by the defense itself. [R. 315-317, 97, 302-303.]

[7]Except Elizabeth Adam Weiss, who suggested that the fault lay in the manufacturing process. [Ex. 2, letter dated Oct. 10, 1950.]

of the alpha-estradiol present in the tablets regardless of the excipients used or the potency of the tablet. [R. 54, 55, 281-286.]

A defense argument comparable to that urged here was rejected in *Strong, Cobb & Co., Inc. v. United States* (C. A. 6, 1939), 103 F. 2d 671. On page 674, the Court said:

> *"The analyses of the Government chemists are attacked as incorrect. It is said that since the cold tablets contained a number of other ingredients,* such as cascara sagrada, podophyllin, resin jalap, powdered camphor, oleoresin capsicum, and powdered starch, *a strong interference necessarily arose which would greatly affect the accuracy of the analyses.* However, *three of the Government chemists, qualified experts, used methods of analysis which were not identical, and arrived at practically the same result. This is substantial evidence of the correctness of the analyses.* The Government chemists all stated that *the effect of the interfering factor on the result would be negligible.* Moreover, three chemists, two witnesses for the Government and one for appellant, stated in effect that *the presence of the interfering elements would tend to make the acetanilid content higher than it actually was.* Since the adulteration found was a substantial deficiency in acetanilid and quinine sulphate, *the error, if any, resulting from the presence of the interfering elements, would be favorable to appellant rather than prejudicial."* (Emphasis added.)

The almost complete parallel to the instant situation is evident.

Another contention of appellants is that these tablets were properly manufactured under conditions that should

have produced a 22 microgram tablet plus a 5% overage of alpha-estradiol. The assertion is made that Mr. Galindo's testimony and worksheets regarding the manufacturing process are "uncontradicted and unimpeached," with the inference that such evidence was *conclusive* of the central issue—whether the drug contained 22 micrograms of alpha-estradiol when introduced into interstate commerce by the appellants. (App. Op. Br. pp. 29-30.)

Let us examine this contention. To state that Mr. Galindo's testimony stands "uncontradicted and unimpeached" is to disregard the Record completely. Both his testimony and the worksheets he identified were demonstrated to be permeated with discrepancies, omissions, and admitted errors, and were obviously wholly unreliable.[8] [R. 133-145, 153-156.] Rarely, we submit, does a record so clearly reflect the utter discrediting of evidence given by a particular witness as in the case of the Galindo testimony and worksheets. Yet appellants would urge this testimony as "conclusive."

The so-called "manufacturing controls" exercised by Crest disintegrated under scrutiny. It is noteworthy, too, that Crest did not at any time assay *any* of the Estrocrine tablets it manufactured [R. 133], so that its vice-president, Mr. Galindo, was hardly in a position to testify even inconclusively about the central issue of this case—the alpha-estradiol content of the tablets.

In attacking the validity of the U. S. P. method of assay, appellants say that the method may be suitable for a higher potency tablet but not for the lower potency tablets involved in this case. (App. Op. Br. pp. 30-31.)

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[8]See our summary of Mr. Galindo's testimony, *supra,* at page 8.

They point out that Crest manufactured both a 22-microgram tablet and a 110-microgram tablet for them, yet the Information deals only with the 22-microgram tablets. We quote from page 31 of Appellants' Brief:

> "No claim has been made by the Government at any time that the 110 mcg. products were below the labeled potency. This fact is important for this reason: *It certainly may be assumed that if there had been any question about the potency of the 110 mcg. product a charge would likewise have been made against it.*" (Emphasis added.)

Obviously, no such assumption can be made. There is no showing that the 110-microgram product was ever introduced into interstate commerce or sampled by the Food and Drug Administration. In fact, Mr. Carol testified he had not analyzed any of the 110-microgram Estrocrine tablets, and that no one in the Food and Drug Administration had obtained such tablets for analysis. [R. 297-298.] This wholly conjectural argument of appellants not only rests upon unfounded assumptions, but has no bearing whatever upon any issue in this case. How a failure to charge appellants with respect to their 110-microgram tablets proves or disproves anything about the U. S. P. method of assay or even remotely affects the Government's evidence that their 22-microgram tablets were substantially below their labeled potency, passes understanding.

We submit that the District Court's judgment is overwhelmingly supported by substantial evidence.

C. The District Court Did Not "Misconceive" or "Misapply" Any Legal Principles.

Appellants make a long and tortuous argument in an effort to show that the trial court disregarded the testimony of Dr. Hoyt and Dr. Sobel, and that such action was improper. (App. Op. Br. pp. 32-37.) We respectfully refer the Court to our summary of the testimony of these two witnesses as set forth in our Statement of the Case, *supra* at pages 12-15, and we submit that if the lower court had disregarded their testimony, it would have exercised a sound judicial discretion. We are satisfied, however, and the Record affirmatively shows, that the trial court gave full consideration and careful attention to the testimony of these witnesses—as, for that matter, it gave to all of the witnesses—and simply concluded that the testimony of Dr. Hoyt and Dr. Sobel did not affect or disturb that of Mr. Carol and Dr. Banes.

Appellants try to support their assertion by referring to a colloquy with the lower court regarding a ruling in which the Court, on objection of Government counsel, at first excluded Exhibit H, the Crest Laboratories work-sheet purporting to show how the tablets were made which were later used by Dr. Hoyt and Dr. Sobel. Both the Court and Government counsel thought that defense counsel was simply seeking to inject evidence of assays performed by Dr. Hoyt and Dr. Sobel on tablets other than those involved in this case. Quite properly, the Court said: ". . . his testimony . . . would be entirely immaterial, because it is a different tablet." [R. 122.] After defense counsel clarified and limited the

purpose of this evidence, indicating he was attempting thereby to discredit the U. S. P. method of assay, Government counsel withdrew his objection and the Court admitted the evidence. [R. 126-127.]

If the trial court eventually chose to discount the weight to be given the testimony of Dr. Hoyt and Dr. Sobel, it was because it concluded that these witnesses had failed to discredit that method of assay. As the trier of the facts, this was certainly within the Court's prerogative.

The lower court's position regarding the testimony of these witnesses was brought out clearly in the course of the final argument, demonstrating the Court's convincing logic and grasp of the technical concepts involved:

[R. 301]:

> The Court: ". . . The question in the mind of the court is the absence of any testimony on the part of the defendants as to assays made by the defendants to determine the amount of alpha-estradiol in these tablets."

[R. 304]:

> The Court: "In case you misunderstood my question, I did not mean why didn't you come in with an analysis made under the U. S. P. procedure and method, because I realize that in your defense you have been attempting to show the inaccuracy and inefficiency of the U. S. P. method."
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> * * * * * * * *
>
> The Court: "But, of course, one of the things that would have shown that very clearly would be, for instance, if other methods had been used, because the important question is: What was the quantity of micrograms in that tablet?"
>
> Mr. Elson: "That is right."

The Court: "So that, if you had no faith in one system, then, of course you put on men who had no faith in that system, for that purpose. But the simplest, the most effective way to prove that would have been to have men testify who used other systems, who, after making analyses, would tell you, for instance, that there were 22 micrograms in that tablet. I asked Dr. Hoyt that question.

I asked Dr. Hoyt, 'If they had submitted to you the particular tablets involved here, could you have made an analysis that would accurately have told us the number of micrograms in it?'

He said, 'Yes, I believe I could.'

Now, just assume that he could. Then, of course, with all this testimony where he tears down this other system, if he could testify that actually on these tablets that these chemists have run their tests on to show there are 6 micrograms where there are supposed to be 22, 15 where there are supposed to be 22, and so on, 'By using' such and such 'method, I have run a test analysis that shows that actually there were 22 micrograms in there,' if that evidence was available, surely it would have been produced here in court. If he could have made an analysis by any recognized or reputable method that would have shown 22 micrograms in those particular tablets, surely you would have produced that evidence."

Manifestly, it appeared to the District Court that the Government's witnesses had established the presence of substantially less than 22 micrograms of alpha-estradiol in these tablets. Testimony of defense witnesses, insofar as they had examined these tablets, was to the same effect, but they contended that the U. S. P. method of assay was not sound. Yet one of the defense witnesses,

Dr. Hoyt, assured the Court that had these tablets been submitted to him he could have made an accurate assay of their alpha-estradiol content by another method. [R. 263.] If that were true, and if *such* an assay would disclose the alpha-estradiol content of these tablets to be up to the declared strength, evidence of *that* assay would have implemented the contention that the U. S. P. method was inaccurate. Such evidence, if available, would surely have been produced, and the failure to produce it was a factor which the Court was entitled to consider in its appraisal of the evidence in the case. The propriety of these reflections is sustained in the observations made by this Court in the recent case of *C-O-Two Fire Equipment Co. and Maynard Laswell v. United States* (C. A. 9, May 29, 1952, No. 12964), F. 2d, on page 12 of the slip opinion:

> "In the instant situation appellants have not come forward with any satisfactory explanation for the admitted price uniformity, nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions, save for the bare statement that such provisions were abrogated. Appellants, in their brief, advise this court that 'a great deal of evidence could have been offered below on costs, economics, and so forth.' While that may well be true, it brings to mind the thought of Shakespeare '* * * oftentimes excusing of a fault doth make the fault the worse by the excuse.' At least it does not make appellants' position any better, since evidence which could have been offered, but was not, is as nothing."

Appellants suggest that the trial court in effect shifted the burden of proof upon the defendants. (App. Op. Br.

pp. 21 and 44.) This, plainly, the Court did not do. The burden of proving every material allegation of fact beyond a reasonable doubt was of course upon the Government and remained there, but the Government did not have to establish its case beyond *all* doubt. (*Pasadena Research Laboratories, Inc. v. United States* (C. A. 9, 1948), 169 F. 2d 375, 379, cert. den., 335 U. S. 853.) The Government's evidence established at the very least the *prima facie* validity of the various methods of assay used by its witnesses, including the U. S. P. method. To the extent that the defendants chose to attack the U. S. P. method, it was incumbent upon them to adduce evidence sufficient to discredit that method. This they did not do, and the trial court merely suggested one line of testimony which, if available, might have helped the defendants. And acting upon this suggestion, defense counsel sought and obtained permission to reopen the case, after both sides had rested and after Government counsel had concluded his argument, for the purpose of introducing the deposition of Mrs. Weiss. [R. 308-309.]

Tied in with appellants' argument on this point is the relationship between 21 U. S. C. 351(b) and 21 U. S. C. 351(c). (App. Op. Br. pp. 39-46.) Both of these provisions specify circumstances under which a drug or device shall be deemed to be adulterated. Section 351(b) by its terms is applicable only to a drug which "purports to be or is represented as a drug the name of which is recognized in an official compendium." Such a drug is adulterated if "its strength differs from . . . the standard set forth in such compendium." However, the adulteration counts in the instant Information do not charge violation of Section 351(b) but rather of Section 351(c).

Section 351(c) declares that a drug is adulterated, *if it is not subject to Section 351(b),* and if "its strength differs from . . . that which it purports or is represented to possess."

As stipulated, the five shipments in question were all made prior to *June, 1950.* [Ex. 1.] The United States Pharmacopoeia—an official compendium under 21 U. S. C. 321(j)—did not recognize alpha-estradiol tablets until *November, 1950.* [R. 281.] Consequently, at the time these shipments were made, the drug was not recognized in an official compendium and hence could not be considered adulterated within the meaning of 21 U. S. C. 351(b). The defendants could be held criminally responsible under 21 U. S. C. 331(a) and 333(a) for the shipment of these drugs only if they were adulterated at the time when they were introduced into interstate commerce. (*Pasadena Research Laboratories, Inc. v. United States* (C. A. 9, 1948), 169 F. 2d 375, 380, cert den., 335 U. S. 853.) Accordingly, the drugs in these shipments, being below their declared potency when introduced into interstate commerce months before their recognition in the U. S. P., were adulterated under the terms of Section 351(c) rather than Section 351(b).

Section 351(b), for the reasons stated, clearly has no application to the instant case. Therefore, the requirement in that subsection that the method of assay set forth in an official compendium shall be used to determine whether there is a deviation from the standard prescribed by such compendium, is entirely immaterial here. Where, as here, the charge is that a drug is adulterated under 21 U. S. C. 351(c), there is no restriction whatever as to the method of assay which may be employed. Here, the Government

did use the U. S. P. method, but it also relied upon other methods, and a variety of corroborative techniques and analytical procedures, and there was no objection to the introduction of any of this evidence.

Only when the trial court expressed concern over defendants' failure to implement their attack on the U. S. P. method by presenting affirmative testimony, based upon other available methods of assay, that their tablets did in fact contain 22 micrograms of alpha-estradiol—only then did defendants advance the theory, with which the trial court properly disagreed, that evidence based upon such other methods would not be admissible because of the requirements of Section 351(b). [R. 305-307.]

D. Other Contentions Advanced by Appellants Are Also Without Merit.

Appellants criticize the Government's witnesses for using any method of assay other than the U. S. P. method. (App. Op. Br. pp. 28-29, 40-41, and Appendix 17.) We suggest it was eminently proper and in keeping with fundamental principles of scientific investigation to use any sound procedure, including the U. S. P. method, for obtaining and verifying their results. This is a standard practice of the Food and Drug Administration whenever possible. [R. 299.] An important virtue of the U. S. P. method is that "it can be used with relatively simple equipment." [R. 293.] On the other hand, the infrared method used by Mr. Carol "is the most informative and most definite method that we have available." [R. 42.] The results obtained by all of the Government's chemists based upon assays of different portions of the same samples were "comparable" with only "slight variations" [R. 294-295], and all showed the drugs to be seri-

ously below their labeled potency. (See Appendices A, B and C, *infra.*)

Appellants were sentenced as follows: the corporate defendant to pay a fine of $2500, and the individual defendants to pay a fine of $250 each. [R. 28-31.] Speaking of the fine imposed upon the corporation, appellants declare they are informed it was the largest imposed upon any defendant in a food and drug case in 1951. (App. Op. Br. pp. 4 and 47.) This would be wholly immaterial even if true, but appellants are misinformed.[9]

That the trial court chose to assess a substantial penalty is indicative of its recognition of the seriousness of the offense. The drugs in question are female sex hormones

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[9]The amount of sentence is discretionary with the trial court within the limits prescribed by the particular statute and will not be considered on appeal. (See Cyclopedia Federal Procedure (2d Ed.), Vol. 9, Secs. 4537-4540; *Williams v. New York,* 337 U. S. 241 (1949); *Feinberg v. United States,* 2 F. 2d 955, 958 (C. A. 8, 1924).)

The following are among the sentences imposed under the Federal Food, Drug, and Cosmetic Act in 1951:

(a) *United States v. Coburn Farm Products Corp. and Julius Cohen* (S. D. N. Y., Docket C-132-213, Jan. 17, 1951), individual defendant fined $3750.

(b) *United States v. Charleston Drug Co. and Frank C. Harp* (D. Nev., Docket No. 12166, March 8, 1951, individual defendant fined $2500 and put on probation for year on condition that he pay the fine and violate no laws.

(c) *United States v. Fisher Drug Co. and Harold C. Jenkins* (D. Nev., Docket No. 12164, March 8, 1951), individual defendant fined $2500 and put on probation for one year on condition that he pay the fine and violate no laws.

(d) *United States v. Enos A. Hilterbrand* (N. D. Texas, Docket No. 12870, Nov. 28, 1951), defendant sentenced to two years in penitentiary.

(e) *United States v. Diamond State Poultry Co., Inc* (D. Del., Docket Nos. CR 705 and 726, May 21, 1951), total fine of $3000 ($2250 on Docket No. CR 705 and $750 on Docket No. CR 726).

(f) *United States v. Frigid Food Products, Inc.* (W. D. Tenn., Docket No. CR 7950, Dec. 7, 1951), defendant fined $4000.

which were "to be dispensed only by or on the prescription of a physician." [R. 38, 8, 354.] Of necessity, the physician must rely upon the integrity of the product and the vigilance of the Food and Drug Administration. He cannot stop to have assays made of every drug he dispenses.

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."
>
> *United States v. Dotterweich* (1943), 320 U. S. 277, 280.

A drug distributor has an absolute responsibility for adulterated or misbranded drugs that he introduces into interstate commerce.

> "Hardship there doubtless may be under a statute which . . . penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."
>
> *United States v. Dotterweich* (1943), 320 U. S. 277, 284.

Nor is it any defense for the distributor that he was relying upon the integrity of the manufacturer. (*United States v. Parfait Powder Puff Co., Inc.* (C. A. 7, 1947),

163 F. 2d 1008, cert. den., 332 U. S. 851.) Of course, the interstate distributor may immunize himself from the penalties of the law by obtaining a valid guaranty from the manufacturer, thereby shifting criminal responsibility to the latter. (21 U. S. C. 333(c)(2); *Barnes v. United States* (C. A. 9, 1944), 142 F. 2d 648, 650.) Here the defendants produced no guaranty from the manufacturer, and neither the defendants nor the manufacturer had any assays made to check the potency of these tablets until after the Food and Drug Administration notified the defendants that their interstate shipments were in violation of the law. [R. 74, 132-133.] See *Pasadena Research Laboratories, Inc. v. United States* (C. A. 9, 1948), 169 F. 2d 375, 385-386, cert. den., 335 U. S. 853, where this Court considered similar evidence of "poor manufacturing controls."

VII.

Conclusion.

It is submitted that no error was committed by the lower court and that its judgment should be affirmed.

Respectfully submitted,

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APPENDIX A.

Findings of Jonas Carol

(Infrared Method of Assay)

Count	Sample No.	Woodard Lot No.	Date of Analysis	Milligrams Per Tablet	Micrograms Per Tablet	Percent of Declared Strength
I and II	29-794 K	497567	1-20-50	.015	15	68
			8-6-51	.015	15	68
III and IV	49-677 K	897618	4-14-50	.014	14	63
V and VI	49-693 K	107694	5-31-50	.006	6	28
			8-6-51	.005	5	23
VII and VIII	53-254 K	497567	1-20-50	.015	15	68
IX and X	88-164 K	107694	6-13-50	.006	6	28

APPENDIX B

Findings of Dr. Edward Haenni

(U. S. P. Method of Assay)

Count	Sample No.	Woodard Lot No.	Date of Analysis	Milligrams Per Tablet	Micrograms Per Tablet	Percent of Declared Strength
III and IV	49-677 K	897618	4-14-50	.014	14	63
V and VI	49-693 K	107694	5-31-50	.007	7	32
IX and X	88-164 K	107694	6-13-50	.007	7	32

APPENDIX C

Findings of Dr. Daniel Banes

(U. S. P. Method of Assay)

Count	Sample No.	Woodard Lot No.	Date of Analysis	Milligrams Per Tablet	Micrograms Per Tablet	Percent of Declared Strength
I and II	29-794 K	497567	8-6-51	.016	16	73
III and IV	49-677 K	897618	8-6-51	.016	16	73
V and VI	49-693 K	107694	8-6-51	.0068	6.8	31
VII and VIII	53-254 K	497567	8-6-51	.016	16	73
IX and X	88-164 K	107694	8-6-51	.0066	6.6	30

No. 13259.

IN THE

United States Court of Appeals

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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Appellee.

APPELLANTS' REPLY BRIEF.

I.

There Is No Substantial Evidence in the Record Consistent With Any Hypothesis but That of Innocence.

On page 17 of Appellee's Brief (and several times elsewhere in that brief), it is asserted that the evidence relied on by the Government was direct evidence, as distinguished from circumstantial evidence, and that therefore the rule announced on page 22 of Appellants' Opening Brief does not apply. (This rule in substance is that where all of the substantial evidence is as consistent with a reasonable hypothesis of innocence as with guilt, it is the duty of the appellate court to reverse the judgment.) This rule, it is said, applies only where the evidence relied upon for conviction is circumstantial rather than

direct. We believe that limitation upon the use of the rule to be correct. The evidence relied upon for conviction, however, was not direct, but circumstantial evidence.

Without quoting from the multitude of cases defining the difference between those two classes of evidence, it is sufficient to state that "Direct evidence is that which immediately points to the question at issue" whereas "* * * 'circumstantial' evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact." (*United States v. Greene* (D. C. Ga. 1906), 146 Fed. 789, 824.)

To the same effect see:

Radomsky v. United States (C. A. 9, 1950), 180 F. 2d 781, 783;

United States v. Stoehr (D. C. Pa. 1951), 100 Fed. Supp. 143, 163;

Rumely v. United States (C. C. A. 2d 1923), 293 Fed. 532, 551;

Jones' Commentaries on Evidence, Vol. I, Sec. 6(5), p. 29.

The evidence of the Government offered in support of the charges may be boiled down to the following:

1. That the Government witnesses conducted assays by several methods, of samples of the products involved and *recovered* and *extracted* substantially less than the labeled potency of 22 mcgs. per tablet.

2. That by previous experiments and the experience of these witnesses, in their opinion the amount recovered was the total amount of estradiol present in the tablets.

3. That estradiol is a stable product and does not lose its potency by the lapse of time.

That evidence was simply evidence of circumstances from which the Government sought to induce the court to infer that therefore, *at the time of shipment,* these products did not contain the labeled potency of 22 mcgs. per tablet. This was not direct evidence "which immediately (pointed) to the question at issue." It was simply evidence composed of facts which gave rise to the inference "as to the existence of the fact in issue"—that the products at the time of shipment did not contain their labeled potency. (*United States v. Greene, supra.*)

On the other hand, the defense evidence was directed to the following:

1. That an amount of estradiol plus a 5% overage was placed in the manufacturing batches sufficient to produce a tablet containing 22 mcgs. of estradiol, as evidenced by the testimony of Mr. Galindo and corroborated by the work sheets [Exs. B, C and D]. This, on the other hand, was direct evidence, for it went directly to the precise point in issue—that at the time of shipment the tablets each contained 22 mcgs. The potency at the time of manufacture would also be the potency at the time of shipment because of the conceded fact that estradiol is a stable product and does not lose its potency. The Government on page 9 of its brief claims that the accuracy of the work sheets was so impeached as to render them useless for evidentiary purposes. We shall deal with this phase shortly.

2. That by assays of samples of some of the products, conducted by reputable laboratories, no more estradiol

could be *recovered* and *extracted* than an amount substantially less than the labeled potency.

3. That in the opinion of Dr. Jeffreys it was doubtful whether, under the U. S. P. method of assay, all of the extradiol could be *extracted* in the extraction stage of the assay by reason of the *excipients present in these tablets in combination with the infinitesimal amount of estradiol also present.*

4. That in order to demonstrate that the U. S. P. method of assay was not suitable or accurate for the assay of these tablets with the excipients composing them in combination with such an infinitesimal amount of estradiol present—that all of the estradiol *could not be extracted* by the U. S. P. method—experiments were conducted first with placebo or blank tablets containing no estradiol, into which approximately 22 mcgs. of estradiol was placed by those conducting the experiment, and then with tablets composed identically with those in question with the estradiol already present, and that in such experiment it was impossible to *recover* or *extract* the full amount of estradiol (approximately 22 mcgs.) placed in the mix by the persons conducting the experiment.

Throughout Appellee's Brief great stress is laid upon the experience of the Government witnesses. We do not question their experience or their proficiency. Nor can the qualifications of Drs. Jeffreys, Hoyt and Sobel be questioned. Great stress is also laid upon the several assay methods employed by those witnesses, with the end result that the amount of estradiol *measured* by the several methods employed showed substantially less than the labeled potency. We do not question the accuracy

of the *measuring* process. *The crucial point is that of extraction.* The evidence of the Government witnesses amounted to no more than that they extracted so much estradiol, which was substantially less than the labeled potency. We are in complete agreement with the fact that they did not extract any more than they said they did. Neither did the defense witnesses, and in order to show that no more was extractable from a tablet such as this, containing these excipients in combination with such a minute quantity of estradiol, the experiment of Drs. Hoyt and Sobel was conducted, which conclusively proved that substantially less than the labeled potency was not extractable in the assay procedure.

The foregoing constitutes in reality the substantial evidence in this case upon which these judgments must stand or fall. When this evidence is thus appraised, it simply amounts to evidence by the Government that its experts could not *recover* or *extract* more than substantially less than the labeled potency, and that *in their opinion* they had recovered all of the estradiol present. The substantial evidence on the part of the appellants agreed that with tablets such as these, containing the excipients that they did in combination with such a minute quantity of estradiol, the full amount of extradiol present could not be extracted, but that more than the labeled potency was placed in the tablets at the time of manufacture, and, as shown by the experiments of Drs. Hoyt and Sobel, the full amount of 22 mcgs. of estradiol could not be *extracted* under the U. S. P. method and therefore could not be *measured.*

Certainly when thus appraised, it can hardly be said that all of the substantial evidence in this case is consistent only with a reasonable hypothesis of guilt and

is inconsistent with a reasonable hypothesis of innocence. The direct testimony of Mr. Galindo, corroborated completely by the work sheets [Exs. B, C and D], conclusively proves without contradiction that the amount of estradiol claimed to be present was actually present.

II.
Miscellaneous Points.

In an effort to justify the conclusion of the trial court that these products at the time of shipment were below their labeled potency, the Government levels its guns at portions of the defense evidence in an effort to show that it was impeached or otherwise shown to be of no evidentiary value.

1. First it is argued on page 9 of Appellee's Brief that upon cross-examination of Mr. Galindo it was shown that the work sheets were subject to so many errors as to render them incredible of belief.

(a) It is said that in a number of instances the work sheets did not bear any initials showing who performed the operations. A reference to the exhibits will show that the only instances in which the initials were omitted of the individual performing some phase of the operation had to do solely with weight before granulating, weight before tableting or weight after tableting. These operations had absolutely nothing to do with the placing of the materials in the mix and seeing to it that the manufacturing process was properly completed to its final conclusion. In fact, it will be noted that under the column "Raw Materials" of each work sheet, where the ingredients and their respective quantities are listed, the initial appears of each individual who performed that operation. The weight before tableting and after tableting, of which

so much is made in Appellee's Brief, was simply information desired by the laboratory conducting the manufacture for its own information on the cost phase of the operations and had absolutely nothing to do with whether the materials called for on each work sheet in the respective quantities also called for were actually placed in the batch. As to that phase of the operations, each work sheet bears the initials of the individual who performed that operation.

(b) It is said on page 9 of the Appellee's Brief that Mr. Galindo had stated that there was always a manufacturing loss in the tableting process, but was compelled to admit that the work sheets [Exs. F and G] showed no such loss and for that reason the work sheets were of no value in showing what and how much actually went into the batch. It is true that neither of those work sheets showed a loss of weight after tableting and that Mr. Galindo stated that there was always a slight loss in weight during the tableting process. As we have said, however, he pointed out that the only purpose of that information was to provide cost information to the laboratory and to enable the laboratory to approximately compute the number of tablets finally manufactured [R. 140, 149]. Certainly this immaterial discrepancy, if it is one, on a phase having absolutely nothing to do with what and how much went into the manufacturing batch could hardly be said to impeach the accuracy of the entries as to what and how much actually did go into the batch, and which entries show, so far as estradiol is concerned, an overage of 5% more than necessary to produce a tablet containing 22 mcgs. of estradiol.

(c) It is next said that Exhibit G shows a gain in the weight between granulating and tableting and that

Mr. Galindo surmised that this was an error. We accept the statement that it was an error, but it has to do with the information desired by the laboratory for its cost information, entirely aside from the entries on the work sheet showing what and how much went into the batches. With respect to the foregoing attacks on these work sheets, we emphasize that not one word of testimony in this case remotely approaches the impeachment of any of the entries having to do with what and how much went into the manufacturing batches, and that inconsistencies or errors, if you please, such as they are, found in these work sheets, are matters that cannot possibly affect the credibility and authenticity of these documents for the purpose for which they were offered.

(d) It is next said that Mr. Galindo could not explain why Exhibit H did not show the weight after tableting, this being one of the batches prepared for Dr. Hoyt's experiment. As testified to by Mr. Galindo [R. 137-139], this work sheet was made up for the manufacture of these two experimental batches, each to contain 7,000 tablets [R. 127-129]. This work sheet was made up for the purpose of producing a tablet identical with the ones in question. Considering the fact that the information as to weight before tableting and after tableting, etc., was for the purpose of providing cost information to the laboratory and had nothing at all to do with what and how much went into the batch, it is ridiculous to argue that the absence of such information on Exhibit H impeaches in any fashion the accuracy of this sheet. Such information under no stretch of the imagination would be needed. All these people were doing was manufacturing a batch for these experiments and mak-

ing sure that what the work sheet called for went into the batch. Then it is argued that Exhibit H is entitled to no weight because it represents 7,000 tablets to be made, whereas 14,000 were made. This indeed is a fatuous argument. The testimony of Mr. Galindo [R. 127-129] shows that two batches of 7,000 tablets each were made from this work sheet. One batch contained the estradiol and the other contained everything except the estradiol. Considering the purpose for which these tablets were being made, it would have been a foolish waste of time to make up two work sheets, each identical in every respect except for the requirement on one that estradiol be placed in the batch. It should be kept in mind that the ones who were manufacturing these two batches for the experiments were not the employees in the plant, but the top officials of the company, and there was no need to make any but one work sheet and then simply to eliminate the estradiol from the batch in which it was not supposed to be used.

(e) Lastly it is said that Mr. Galindo admitted that something was lost in the manufacturing process, but did not know whether it was estradiol. This argument entirely ignores the *undisputed* testimony summarized on pages 6 and 7 of the Appendix to Appellants' Brief and found in the Record on pages 113, 114, 140, 141, 149 and 150. This testimony was simply that *the estradiol itself could not possibly be lost* because at the outset it is placed in the mixing machine with the powdered ingredients and mixed into one wet homogeneous mass —wet with the estradiol—and mixed completely. The manufacturing loss that occurs is in the tableting process, lost from the dies, and whatever is lost, which is natural in the process, is a loss of the mass itself, which simply

reduces the quantity of the mass finally tableted, it being impossible for the loss to be of estradiol itself. In other words, when a work sheet shows a loss of 4 ounces, it does not and cannot mean a loss of estradiol, but a loss of 4 ounces of the entire mass [R. 140, 141, 147-152].

Under the foregoing analysis it is plain from the direct evidence of the appellants that the quantities of the various materials called for by the work sheets in evidence actually were put into the batches which resulted in a tablet each containing 22 mcgs. plus of estradiol.

2. Several times in Appellee's Brief it is emphasized that Drs. Hoyt, Sobel and Jeffreys conducted their first assay of estradiol in preparation for this case; that the Government witnesses had vast experience in such assays and therefore "if the lower court had disregarded (the testimony of the defendants' witnesses mentioned), it would have exercised a sound judicial discretion" (Appellee's Br. p. 27). Experience in the conduct of assays prescribed in U. S. P. can have no bearing upon the credibility of the expert who is testifying when one considers that each of these three defense witnesses possesses a Ph. D. degree coupled with a wealth of experience in analytical procedures. If experience in the conduct of U. S. P. assays were a necessary qualification, then little, if any, value would there be in prescribing a U. S. P. method. A U. S. P. method is prescribed when it is found to be practicable and one which will "lead to fairly uniform results when applied by different analysts" (U. S. P. XIV, subdiv. 10, p.

xxx). In fact, Mr. Carol on cross-examination stated that a competent chemist (much less a "Ph. D.") should be able to use a U. S. P. method of assay and it would not require that he have experience with a hundred or a thousand assays in order to run it [R. 292], and that the method of assay in question was the best possible they knew of for estradiol and could be used with relatively simple equipment [R. 293].

3. It is also argued that the appellants did not procure assays of these tablets prior to their shipment or until after notice from the Government that samples had been found to be below labeled strength, and that the extraction process had been known for 50 years. The extraction of excipients from a material to be measured concededly has been known to analytical chemistry for many, many years. Whether a particular extraction procedure commonly used is suitable to a certain product, however, is another question. Dr. Jeffreys refused to perform an assay of samples of these products in July of 1950 because he knew of no suitable method to assay a tablet such as this containing such a very small amount of estradiol, and it was not until the U. S. P. method became known that he consented to conduct such an assay. Other assays were made by other laboratories retained by appellants, with a wide variety of results—so wide, in fact, that they were meaningless. [See Ex. 2, letter Dec. 5, 1950.) But the fact remains, and there is not a word in the record to dispute it, that no published method for the assay of estradiol *tablets* of this charac-

ter—which provided an accurate *extraction* method—appeared prior to the U. S. P. method.*

4. Criticism is made on page 13 of Appellee's Brief that Dr. Hoyt did not use the so-called U. S. P. Reference Standard estradiol for the conduct of his experiment. The Reference Standard provides that the estradiol shall have a melting point and an optical rotation within the range testified to by the defense witness Harry Rosenzweig [R. 78 *et seq.*]. Dr. Hoyt stated that he used a product labeled "Estradiol U. S. P.," labeled to be in conformity with the U. S. P. [R. 239] and obtained from a pharmaceutical supply house other than any involved in this case. He checked that so obtained against estradiol obtained from Dr. Clare E. Zagel at the University of California and found them to compare [R. 251 and 252]. The description of U. S. P. Estradiol is given in the Monograph, page 225 of Volume XIV, U. S. P. When found to compare with the requirements for U. S. P. estradiol, obviously that was all that was necessary to render it suitable for use.

5. Reference is also made on page 15 of Appellee's Brief to the fact that appellants introduced the deposition of Elizabeth Adam Weiss. This deposition had not

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*Mr. Carol could only state generally that the principles of extraction had been known for many years. He did not refer to one method of *extraction* for an estradiol tablet of this character that had been published or otherwise known. He did enumerate several methods of *measuring* the amount of estradiol *after* extraction [R. 39-41]. It is conceded that there existed many methods for thus measuring the amount of estradiol, but, as all witnesses conceded, that presented no problem. It was the *extraction* of the estradiol that presented the problem, and these outstanding scientists possessing Ph.D. degrees, who testified for the defense, flatly stated that no extraction procedure for the assay of an estradiol *tablet* appeared prior to the U.S.P. method.

been introduced before for the reason that counsel for appellants felt her conclusions inaccurate. (See Appellants' Op. Br. p. 11.) It was only after the court stated that it was impressed with the fact that appellants had introduced no evidence to show the amount of estradiol in the tablets involved that counsel for appellants asked to re-open the case and supply that information to the court, even though he believed it unreliable.

Space does not permit us to answer in any more detail the arguments advanced in Appellee's Brief. We believe, however, that they have been sufficiently covered in Appellants' Opening Brief and what has been said in this Reply Brief, and it is therefore submitted that the evidence here falls far, far short of being "only * * * consistent with guilt, * * * (and) inconsistent with every reasonable hypothesis of innocence." No matter how searching an analysis is made of this record, it simply cannot be said that the evidence in this case points "so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt." (*Karn v. United States* (C. C. A. 9, 1946), 158 F. 2d 568, 570.)

The judgments should therefore be reversed.

Respectfully submitted,

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